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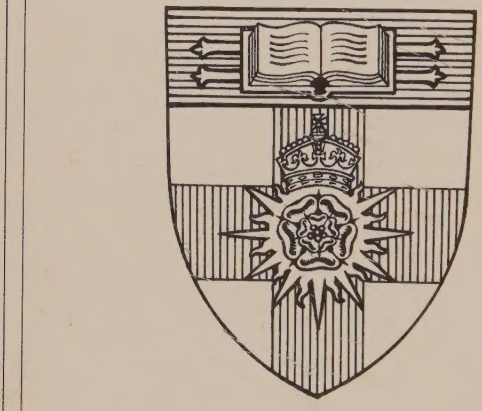

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1898.

GEEN *v.* VESTRY OF ST. MARY, NEWINGTON.

1898
April 20.

Metropolis—Management Acts—Nuisance—Sewer—Drain—Drainage of Contiguous Houses by Combined Operation—Subsequent unauthorized Connection with Drain from Adjoining Premises—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Four houses in the metropolis were in 1874 drained by a combined operation under an order of the vestry. A drain from the stable of an adjoining house was afterwards, without the knowledge of the vestry, connected with this drain, and the drainage from the stable turned into it. Subsequently a nuisance arose owing to the defective drainage of the four houses, and the then owner of the houses, who had not authorized or known of the making of the connection with the drain from the stable, was required by the vestry to abate the nuisance:—

Held, that the unauthorized connection of the drainage from the stable with the drain from the four houses converted the latter into a sewer, and that therefore the owner was not liable to abate the nuisance.

CASE stated by a metropolitan police magistrate.

The appellant, who was the owner of four houses, Nos. 8, 10,

1898

GEEN v. NEWINGTON VESTRY.

12, and 14, Clandon Street, in the parish of St. Mary, Newington, was summoned by the respondents under s. 2 of 54 & 55 Vict. c. 76 (the Public Health (London) Act, 1891), in respect of a nuisance existing upon the premises by reason of the defective drainage of the said houses. The existence of the nuisance was admitted, and the only question was whether the appellant or the respondents were liable to abate it.

In the year 1874 the houses in question were owned by one John Gant, who on June 5 of that year applied to the respondents for their order under 18 & 19 Vict. c. 120, to drain the said four houses by a combined operation, and deposited with the respondents a plan of the proposed drainage. After the deposit of the plan the houses were in fact drained according to the plan, and the nuisance now complained of arose from the defective condition of that drainage.

At the hearing the respondents produced, from the office of their surveyor, their plan-book, which contained the said plan, and the plan had upon it a note initialled by their then surveyor, James Gledhill (since deceased), in the words, "Viewed by Goatman and found to be laid satisfactorily." Goatman was called as a witness, and said that he superintended the drainage work as a foreman under the then surveyor; but no minute of the respondents or of any of their committees could be found having any reference to the matter. The appellant contended that there was no evidence of any order by the respondents sanctioning the combined drainage operation; but the learned magistrate decided against this contention, being satisfied on the evidence that the combined drainage operation was then sanctioned by the respondents.

It was further proved that a connection now existed between the combined drainage of the four houses and the drains of the stable of the adjoining house, No. 6, Clandon Street, and that by means of such connection the stable now drained into and through the combined drainage of the four houses. The connection had existed for fourteen years at least, but had not been made by, or by any authority of, the appellant or to his knowledge. It was not proved how or when, or by whom, or under what circumstances the connection was made, and it was

not proved whether the house now numbered 6, Clandon Street, or its stable had at any time since 1874 been in the same ownership as the four houses, and the only fact which the learned magistrate was able to find (and which he did find) about the making of the connection was that it was made without the knowledge of the respondents at some time subsequent to the completion of the combined drainage operation by which the said four houses only, and no other premises, were then drained.

The appellant contended that the respondents, and not the appellant, were liable to keep the drainage of the said four houses in repair, and cited *Kershaw* v. *Taylor*. (1) The learned magistrate was of opinion that the case was distinguishable from *Kershaw* v. *Taylor* (1), and made an order upon the appellant to abate the nuisance.

The questions for the opinion of the Court were—(1.) whether there was any evidence by which the learned magistrate might be satisfied that the four houses were drained by a combined operation under the order of the respondents; and (2.) whether, assuming the first question to be answered in the affirmative, he was right in holding the appellant to be liable to abate the nuisance.

English Harrison, Q.C. (*A. C. Glen* with him), for the appellant. Primâ facie, having regard to s. 250 of the Metropolis Local Management Act, 1855 (2), this contrivance was a sewer, unless it was made under an order of the vestry for a combined drainage operation, and there was no evidence before the magistrate of any such order having been made. It being

(1) [1895] 2 Q. B. 208, 471.

(2) By 18 & 19 Vict. c. 120 (the Metropolis Local Management Act, 1855), s. 250, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses, by a combined operation, under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

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primâ facie a sewer, the onus was upon the respondents to shew affirmatively that such an order had in fact been made. It is true that an order for a combined drainage operation need not be formally drawn up in writing, as was held in *Bateman* v. *Poplar District Board of Works* (1); but the evidence in the present case is insufficient to warrant the inference that the plan ever went before the vestry or was approved by them. Secondly, even assuming that there was originally an order for a combined drainage operation, the fact that the drainage from the adjoining premises now flows into it has changed what was originally a drain into a sewer: *Kershaw* v. *Taylor*. (2) The case is indistinguishable from *Holland* v. *Lazarus* (3), where Bruce J. held that the unauthorized connection of a rain-water pipe from an adjoining house turned a drain into a sewer. [He also cited *Reg.* v. *St. Matthew, Bethnal Green.* (4)]

Macmorran, Q.C. First, there was ample evidence of the making of an order by the vestry for drainage by a combined operation. [He was stopped on this point.] Secondly, the addition of the drainage from the stable did not necessarily make the drain a sewer. The decision in *Kershaw* v. *Taylor* (2) does not support that contention: it does not decide that the making of an unauthorized connection with an existing drain turns it into a sewer.

[WILLS J. It is reasonable that it should be so, for the owner could not remedy such a state of things on discovering it, whereas the local authority could.]

The unauthorized act of a stranger cannot alter the relation between the owner and the local authority. It is admitted that the case cannot be distinguished from *Holland* v. *Lazarus* (3); but that was a nisi prius decision, and should not be adopted in this Court. [He also cited *Bateman* v. *Poplar District Board of Works* (*No.* 2). (5)]

WILLS J. I am of opinion that this appeal must be allowed. In my judgment it is a clear case. The first question for

(1) (1886) 33 Ch. D. 360.
(2) [1895] 2 Q. B. 208, 471.
(3) (1897) 66 L. J. (Q.B.) 285.
(4) [1896] 2 Q. B. 319; [1898] A. C. 190 (sub nom. *Bethnal Green Vestry* v. *London School Board*).
(5) (1887) 37 Ch. D. 272.

our determination is whether this was originally a combined system of drainage sanctioned by the vestry: I think there is abundant evidence that it was. A plan was deposited with the local authority by the then owner who proposed to make the drain, and the plan itself has been found in the plan-books belonging to the vestry; that plan was acted on and was signed by the proper officer, and a memorandum made upon it shewing that the work had been done in conformity with the plan. Under these circumstances it is not unreasonable to conclude that the plan had received the requisite sanction, and that the vestry had allowed a combined system of drainage to be constructed: on this point my opinion is in entire accord with that of the learned magistrate.

Then comes the second question, whether, as things now stand, this is a drain or a sewer. The statute says in substance that if it is not a drain it is a sewer, for a "drain" is that which is used for the drainage of one building only or of a group or block of houses by a combined operation under the order of the local authority, while "sewer" includes sewers and drains of every description except "drains" as so interpreted. If therefore the facts stopped there, this would clearly be a drain. But by some means other drainage has got into this drain, and it has for many years been used for draining the stabling of an adjacent house as well as for draining the four houses for which it was originally provided. I think that that is sufficient to alter the character of this drain, and that it has now become a sewer. I do not think that there can be any doubt about the propriety of this view, which has already received judicial sanction in *Holland* v. *Lazarus* (1); it seems really impossible to call this pipe, under such circumstances, a drain. The order of the learned magistrate must therefore be quashed.

KENNEDY J. I am entirely of the same opinion. On the first point I think there was abundant evidence to justify the learned magistrate in finding that the requisite authority had

(1) 66 L. J. (Q.B.) 285.

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been given for the construction of a combined drain for the four houses. The only other question is whether, having regard to the circumstance of the additional drainage which now comes into it, this contrivance is now a drain or a sewer. These two expressions are defined by s. 250 of the Act of 1855. On the facts I am clearly of opinion that this is a sewer, and I do not see how it is possible for the respondents to avoid the necessary inference from the language of the section. I adopt, and apply to the facts of the present case, the language of A. L. Smith L.J. in *Reg.* v. *St. Matthew, Bethnal Green* (1), where he says: "I do not see how the terms of the definition clause can be got out of; and it appears to me that, this being de facto a sewer within those terms, as taking the drainage of more than one house, and not being a drain for draining a block of houses by a combined operation under an order of the vestry, it must be vested in the vestry."

Judgment for the appellant.

Solicitors for appellant: *Todd, Dennes & Lamb.*
Solicitor for respondents: *W. T. Ricketts.*

(1) [1896] 2 Q. B. 319.

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[IN THE COURT OF APPEAL.]

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THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* BILLINGTON, LIMITED.

Railway—Regulation—Charge for Use of Sidings—Right of Action—Arbitration—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25)—*Provisional Order.*

By a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, and confirmed by statute, a railway company were empowered to charge, in addition to the tonnage rate, a reasonable sum for the service, if rendered to a trader at his request or for his convenience, of allowing him "the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof, and services rendered in connection with such use and occupation," and "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

The company gave notice to the defendant, a trader, that they would allow him four days, free of charge, within which to unload goods consigned to him arriving at their station, and that after the expiration of the four days they would charge him 6*d.* per day siding rent for each wagon allowed to remain unloaded. In an action by the company to recover from the defendant siding rent at the rate of 6*d.* per day in respect of wagons which, after receiving that notice, he had allowed to remain unloaded after the four days, the defendant disputed his liability to pay the amount charged:—

Held, that the jurisdiction of the Court was ousted, because under s. 5 of the statute an arbitrator appointed by the Board of Trade is the only tribunal for the settlement of any differences arising under that section.

Judgment of the Divisional Court, [1898] 1 Q. B. 748, reversed.

APPEALS from a judgment of a Divisional Court, reported [1898] 1 Q. B. 748, where the facts are more fully set out, and from another judgment of the same Divisional Court.

The first action was brought in a county court to recover 27*l.* alleged to be due from the defendant, a coal merchant at Crewe, to the plaintiffs, a railway company, for rent of sidings.

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The defence was that the Court had no jurisdiction to try the case, because under the London and North Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxi.), jurisdiction was given to an arbitrator to be appointed by the Board of Trade. (1)

In January, 1895, the general manager of the plaintiff company gave notice to traders (including the defendant) receiving coal and coke sent by the London and North Western Railway that four days would be allowed free of charge to the consignee to release each wagon, exclusive of the day of arrival, and that a siding or standage rent would be charged at the rate of 6*d.* per day, or part of a day, for every wagon not so released and remaining on the company's premises.

The defendant had allowed wagons loaded with coal consigned to him, and sent over the plaintiff company's railway, to remain on their premises after the four days specified in the notice had expired, and had given no notice to the company that he did not require the accommodation or service.

The county court judge found that the plaintiff company had demanded the siding rent from the defendant, but that he had always refused to pay, and in fact had never paid it, and that he had always told the company's servant that it was "exorbitant and unjust." He was of opinion that, under those circumstances, the county court had no jurisdiction, and he gave judgment for the defendant.

(1) Schedule of maximum rates: Sect. 5, "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience."

"(iv.) The detention of trucks, or the use or occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof; . . . . And services rendered in connexion with such use and occupation."

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On appeal the Divisional Court (Wright and Darling JJ.) reversed this decision. (1)

The defendant appealed.

The second case was a similar action tried in another county court. The judge found that the defendants had not disputed before action brought the reasonableness of the amount of the charge or of the limit of four days, but only the right of the plaintiffs to make any charge. He held that he had jurisdiction, and gave judgment for the plaintiffs.

On appeal the Divisional Court (Wright and Darling JJ.) affirmed this decision.

The defendants appealed.

T. Willes Chitty (with him *Gilchrist Alexander*), for the defendants. No doubt originally the company had power to say that unless their charges were agreed to they would not perform the services. This is not, as the Divisional Court seem to have thought, a case of compelling the company to give the services on such terms as an arbitrator may settle, but a case of the reasonableness of their charges when the services have been rendered. This is exactly what the Provisional Order says is to be determined by the arbitrator. The company, on the other hand, are seeking to charge what they consider a reasonable amount. The reasonableness of the charge depends, not merely on the amount of money to be paid, but on the time limit, the facilities afforded for removing goods during that time, and other matters. The whole question is one for the arbitrator, and it cannot have been intended that the matter should go in succession before two tribunals. If this were the case, the same process would have to be gone through in matters arising under any of the sub-sections of s. 5. There is nothing strange in the appointment of a special tribunal to determine what charges can be made by a public body—for instance, in the cases of building societies or water rates. [He referred to *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2), *Lancashire and Yorkshire Ry. Co.* v. *Greenwood* (3), and *London and North Western Ry. Co.* v. *Price.* (4)]

(1) [1898] 1 Q. B. 748.
(2) (1885) 11 App. Cas. 97.
(3) (1888) 21 Q. B. D. 215.
(4) (1883) 11 Q. B. D. 485.

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In the second case the county court judge decided that he had jurisdiction; but there was not the less a dispute within the Act, because the trader denied his liability to pay anything, and, there being a dispute, it ousted the jurisdiction of the Court.

C. A. Russell, Q.C., and *W. J. Noble*, for the plaintiffs. The Divisional Court has decided in three cases before this that these Provisional Orders only give jurisdiction to the arbitrator where there is a difference as to amount: *Midland Ry. Co.* v. *Haigh* (1), and two unreported cases. It is submitted that this view is right, and that all that the arbitrator has to determine is the reasonableness of the sum charged, when not agreed, and not the existence of facts on which depends the right to make some charge.

The company are not bound to give this accommodation, and, if the defendant chooses to accept it after notice of the terms upon which the company will provide it, he must pay those charges. The powers of the arbitrator only come into operation when there has been no agreement express or implied to pay a particular sum. As a matter of fact, the defendant never objected to the reasonableness of the charges, but only objected to the making of any charge.

The controlling words of s. 5 are "tonnage rate." That rate in this case is composed of the conveyance rate and a station terminal. By s. 3 the station terminal includes accommodation provided by the company at the terminal station in dealing with goods as carriers thereof after conveyance. The period mentioned in sub-s. 4 of s. 5 is the period to which reference is made in s. 3, the sub-section merely defining the time at which the company cease to be carriers. If, therefore, the Railway Commissioners or other competent authority determined that four days was a proper period to be allowed under s. 3 (as the commissioners did in *Manchester and Northern Counties Federation* v. *Lancashire and Yorkshire Ry. Co.* (2)), and if the arbitrator has power to deal with the question of time, and were to determine that six days should be allowed, the company would receive no remuneration for two days. This could easily arise, since the contract for carriage is frequently

(1) (1896) 13 Times L. R. 135. (2) (1897) 76 L. T. 786.

made with a person other than the person who receives the accommodation under s. 5.

In the second case the county court judge has found that the only protest of the defendants was against any charge being made; and consequently there was no dispute as to the reasonableness of the charge which necessitated going to arbitration.

A. L. SMITH L.J. This is an application with regard to a point between railway companies and traders that has not as yet been before the Court of Appeal. The real question is, What is the true construction of s. 5 of the Provisional Order of the London and North Western Railway Company, which is in the schedule to the Act of 54 & 55 Vict. c. ccxxi. Before I come to this order I wish to make an observation as to how it came into existence. Prior to the year 1888, railways, subject to their Parliamentary powers, had tables of rates and charges which they were entitled to make. In that year a new order of things came into existence, and the Railway and Canal Traffic Act, 1888, was passed. Sect. 24 of that Act, Part II., relates to traffic. The head-note is not part of the Act, but it fairly represents what is in the long section. It is a section which enacts a "revised classification of traffic and schedule of rates." The 10th sub-section of s. 24 is in these words: "The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act"—which means that a Provisional Order made and confirmed by an Act of Parliament is just as much an Act of Parliament as the Act itself—"and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make." The rates and charges which the North Western Railway in the present case are entitled to make are the rates and charges which are to be found in the Provisional Order to which I am now about to turn my attention, and as to s. 5 of which the present controversy arises. It is headed, "Schedule of maximum rates and charges and classification of merchandise traffic applicable

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to the London and North Western Railway Company and certain other companies connected therewith." It is a schedule of charges. When I get past ss. 2, 3, and 4, I come to ss. 5, 6, 7, and 8, and I have a good deal to say thereon, because, in my judgment, when those sections are analyzed, it appears to me that the Legislature enacted that the matters comprised in those four sections are, in case of dispute, to go to an arbitrator to be appointed by the Board of Trade. I am aware that learned judges, but mostly my brother Wright, are of opinion that the only matter which could go to arbitration was the reasonableness of the charge. But, with all submission to that learned judge, and to my brother Mathew (my brother Bruce had doubts about it) and my brother Wills, I think that this is not the true construction of this s. 5, and I wish to point out how this section reads according to its grammar and plain sense. It begins, "The company may charge for the services hereunder mentioned or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate." There will come in at the end of every one of the sub-paragraphs 1, 2, 3, 4, 5, 6 and 7 the words "rendered to a trader at his request or for his convenience." When these services have been rendered what is to happen? The section most pointedly goes on in this way—"any difference arising under this section"; not as the railway company want to read it: "any difference arising as to the reasonableness of the sum charged." Where do you find this in the section? Those words are not there, but instead thereof, "Any difference arising under this section"—that is, under any of the sub-sections of this section—"shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." What is the meaning of that? Does it mean that any difference arising under this section is limited to the reasonableness of the charge, or to any difference which arises under any one of the sub-sections, as regards the subject-matter of the sub-section? Take some concrete cases. Sub-s. 1: "Services rendered by the company at or in connection with sidings not belonging to the company." What is the arbitrator to determine? In the first instance, in order that he may get

at the reasonableness of the charge, he must get at the fact whether the service was rendered by the company at or in connection with sidings not belonging to the company, because, if they were rendered in connection with sidings belonging to the company, the company had no right to make this charge under this sub-s. 1. Take No. 2—the collection or delivery of merchandise outside the terminal station. The railway company say, "We charge you 6*d.* a package for services rendered for the collection and delivery of merchandise outside the terminal station." The trader says, "You cannot, because that collection and delivery were within the terminal station, and I demand an arbitration." An arbitrator is appointed. What is the arbitrator to find out in the first instance? He has to find out whether the services rendered, for which the railway company are charging, have been for the collection and delivery of merchandise outside or inside the terminal station. "No," it is said; "the true reading of this section is that where there is a dispute as to whether the siding did or did not belong to the company, or whether the collection and delivery took place inside or outside the terminal station in the first place, either of those two facts must he decided by a court of law, either a county court, or the Superior Court, and then, after that, the Board of Trade arbitrator is to be called in to find out what is the reasonableness of the amount to be charged." I cannot read this section in that way.

I come to the detention of trucks, No. 4: "The detention of trucks, or the use or occupation of any accommodation before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof." Who is to decide, when finding out what is the reasonableness of the charge, what is the period beyond such "as shall be reasonably necessary for enabling the company to deal with the merchandise"? Are the Courts to try that—is that to be tried in the county court, or in the Superior Court, as the case may be, or is it a matter which the arbitrator must decide when he is called in to settle a dispute which has arisen under s. 5 of this Act?

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It seems to me that it is the latter, and that it is a mistake to say that the arbitrator has only to decide part of the case, instead of the whole case which has to be decided, at any rate between the company on the one side, and the trader on the other, under these sub-ss. 1, 2, and 4. I leave out sub-ss. 5, 6, and 7, because the same observations would apply to them, and it is not necessary for me to deal with them. I come to s. 6: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." Is he to go to the county court or the superior court first to find whether or not the trucks which have been kept on demurrage by the company are trucks of the trader or not? And then, having settled that issue in such courts, is he to call in an arbitrator to find out what is the reasonable sum by way of damage? Clearly not. It means that the arbitrator is to have jurisdiction when he is called in to find out whether they were trucks of the trader; secondly, whether they were detained; and, thirdly, if they have been detained, how much the company ought to pay to the trader for having detained those trucks. Sect. 7 is the same in principle: "Nothing herein contained shall prevent the company from making and receiving, in addition to the charges specified in this schedule, charges and payments by way of rent or otherwise for sidings or other structural accommodation provided or to be provided for the private use of traders and not required by the company." Then the arbitrator is to be called in in case of dispute. What is he to decide? He is to decide the question of the charges which are to be recovered. Then I come to s. 8: "In respect of merchandise received from or delivered to another railway company having a railway of a different gauge, the company may make a reasonable charge for any service of transhipment performed by them, the amount of such charge

to be determined in case of difference by an arbitrator." What is he to decide? Is he to decide whether merchandise has been received from or delivered to another railway in order to ascertain the reasonable charge, which is the only matter that he has to decide under s. 8? Of course he must; because without finding whether or not the fact existed whether merchandise had been received from or delivered to another railway company he cannot determine whether the charge is or is not reasonable which is made by the company. He must settle that for himself in the first instance in order to ascertain what the charge is to be.

For these reasons, I am of opinion that when one looks through the whole of s. 5, and the budget of sections with which it is coupled, the true reading of all the sections is that the arbitrator, when he is called in in a case of dispute on any matters arising under any one of those sections, is to adjudicate upon the whole matter once and for all, and that it is not the true reading of the sections to say that a court of law is to be invoked as regards some matters, and that the arbitrator is to be called in with regard to others. With all submission to my brother Wright and the learned judges who have decided otherwise (certainly not with the full argument we have had in this case), the true reading of this section is not that the arbitrator can only be called in for the purpose of ascertaining the reasonableness of the charge. I have not the slightest doubt that the Legislature, in order to ascertain what is the reasonable charge for these sidings, deputed it to the arbitrator appointed by the Board of Trade to find out whether they were services in connection with sidings of the company or not. It is said this involves a matter of title, but it is a matter which a man sent down by the Board of Trade can decide far better than the judge of a county court or the judge of a superior court. For these reasons I think that the construction of these sections is what I have said.

What occurred in this case? The London and North Western Company having sent to their customers, the coal merchants on their different lines, circulars notifying to them that after four days they should charge 6*d.* per day for the detention of

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wagons, the defendant Donellan objected. It is clear from the evidence that he said four days was not long enough to leave the wagons without charge. His case was that, considering the way in which the railway company accommodated him with wagons full of coal, and the uncertain periods at which they brought their wagons, four days were not enough, for he could not get his customers to clear out the wagons within four days, as he did not know exactly when a wagon was coming along the siding, and he refused to pay. I ask myself in these circumstances, Has a dispute arisen within s. 5, sub-s. 4, of this Provisional Order as regards the detention of trucks or not? I should say that there was an obvious dispute. Does a dispute like that come within s. 5, sub-s. 4, on the true reading of it? I think clearly it does, and therefore I think that the defence which was raised in the county court was a good one, namely, that the county court had no jurisdiction to entertain this plaint, because there was a dispute within the meaning of s. 5, sub-s. 4, of this Provisional Order.

Reading the section in the way I have, it seems to me that the same reasoning applies to the other case—*Billingtons' Case*. The defendants took the same class of objection; they would not pay, and never have paid; and what they say is, "You cannot sue us in the county court; you must call in an arbitrator appointed by the Board of Trade to settle the dispute pursuant to the statute." I think the statute has said that that is the tribunal, and the only tribunal, which is to settle that difference between the parties. My brother Wright said twice, I think, in different judgments, that it was the duty of the trader to call in an arbitrator. Why so? The statute says that the difference is to be settled by an arbitrator at the instance of either party. I cannot see that this is so, any more than it may be the duty of the railway company to call in the arbitrator. It seems to me that where the railway company make a charge for the detention of trucks, and the trader will not pay, it is quite as open to the railway company to call in the arbitrator as it is to the trader, if he wishes to do so.

For these reasons I am of opinion that the appeal ought to be allowed, and judgment entered for the trader.

CHITTY L.J. I am of the same opinion. The question really is one of construction of that which has the force of an Act of Parliament. I find in this 5th section, "Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." There is no limit in those words to a difference as to the reasonableness of the sum. The difference must be a difference arising under the section. It appears to me to include the whole section, and, as has already been shewn by the Lord Justice, who has gone through the sub-sections, it would necessarily include all that is material in reference to the seven sub-sections that follow. The sub-sections are unquestionably part of the 5th section itself. The right way of reading it is that, "The company may charge for the services," and then read on sub-ss. 1, 2, 3, 4, 5, 6, and 7, and, having done that, you must add, "When rendered to a trader at his request, or for his convenience, a reasonable sum by way of addition to the tonnage rate." It appears to me that all the matters which are material for the decision of a difference arising under the section, whatever the difference may be, are within the competence of an arbitrator appointed by the Board of Trade to decide. I cannot understand the construction which the railway company by its counsel ask us to put upon this section, because the result is to split up the matters in dispute by making part of them—according to the argument that the reasonableness of the sum is the only thing that the arbitrator is to inquire into—go before one tribunal, and then the other matters of fact, upon which alone he can come to the conclusion about the reasonableness of the sum, are to go before another tribunal, namely, the county court or the High Court. It seems to me that this is exactly one of those cases where the Legislature has taken the matter into its own hand, just as it has done in the Building Societies Acts and some others, and said in effect this: This is a case of a class which is better determined by a skilled arbitrator appointed by the Board of Trade than it is by the ordinary tribunals of the country in this respect. It may be necessary, to enforce the award, to bring an action; but, as has been pointed out during the argument, the enforcement of

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the award can still take place by a simpler method under the Arbitration Act. I cannot for myself understand how it can be said that it was intended to split up the remedy and the mode of settling the differences by going to various and different tribunals. It would increase the expense largely. It would be vexatious, perhaps not so much to a large railway company who can afford the luxury of litigation, but it would be a great hardship upon an ordinary trader, who may be a small man, if he were to be dragged before different tribunals for the settlement of this dispute.

I quite agree with what has been said by the Lord Justice with reference to it being the duty of the trader to ask the Board of Trade to appoint an arbitrator. That is not in accordance with the very language of the section which I have read. The arbitrator is to be appointed at the instance of either party. Directly the railway company finds that there is a dispute, the railway company may go to the Board of Trade and ask the Board of Trade to appoint an arbitrator: That at any rate, in my opinion, and that alone, is the tribunal to which the Legislature has by this section relegated the question. I should make the same observations on the 6th section where the words are, "Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." There is no limitation upon either of those. I decline to add one word to the words which seem to be advisedly and for good reason put in this section. The rest of the case, I think, is quite simple. I shall not go into the facts again. There is, in my opinion, a difference arising under this section in question in both the cases that are now before us, and which are under appeal.

Appeals allowed.

Solicitor for plaintiffs: *C. H. Mason.*

Solicitor for defendant: *Jaques & Co., for George Turnbull, Bradford.*

A. M.

KIRSHENBOIM, Appellant *v.* SALMON AND GLUCKSTEIN, LIMITED, Respondents.

1898 May 7.

Trade-mark—Merchandise Marks—False Trade Description—Application to Goods—Absence of Intent to Deceive—Liability—Merchandise Marks Act, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

By the Merchandise Marks Act, 1887, s. 2, sub-s. 2, a person who sells goods, to which a false trade description is applied, is guilty of an offence, unless he proves certain facts, "or that otherwise he acted innocently."

By s. 3, sub-s. 3, "'False trade description' means a trade description which is false in a material respect as regards the goods to which it is applied."

The respondents were charged with selling cigarettes, to which a false trade description, namely, "guaranteed hand-made," was applied. The cigarettes were in fact machine-made, but were of equally good quality with hand-made cigarettes.

The magistrate held that there was no intention to deceive the buyer, but only to save expense by using up a stock of old labels, and that the description, though untrue in fact, was not a false trade description in any material respect, as regarded the cigarettes sold, within the meaning of s. 3, and dismissed the information.

On a case stated:—

Held, that the fact that the cigarettes sold as hand-made were of as good quality as hand-made cigarettes afforded no defence; that the description was false in a material respect, and that the respondents, having knowingly applied the false description, had not acted innocently, and were guilty of an offence against the Act.

Case stated by a metropolitan police magistrate.

An information preferred by the appellant against the respondents under s. 2 of the Merchandise Marks Act, 1887 (1), charging

(1) 50 & 51 Vict. c. 28. By s. 2, sub-s. 2, "Every person who sells . . . . any goods or things to which any . . . . false trade description is applied . . . . shall, unless he proves—

"(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the . . . . trade description; and

"(*b*) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act."

Sub-s. 3 imposes penalties.

By s. 3, sub-s. 1, "The expression 'trade description' means any

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that the respondents on June 28, 1897, did sell to the appellant certain cigarettes to which a false trade description, namely, the words "guaranteed hand-made by experienced workmen," was applied, contrary to the provisions of the Merchandise Marks Act, 1887, was heard and determined, and the magistrate dismissed the information.

The facts of the case were as follows:—

The respondents sold to the appellant, for the sum of $2\frac{1}{4}d.$, ten cigarettes in a packet, to which a printed label had been affixed, "Ten cigarettes guaranteed hand-made by experienced workmen." The ordinary price for ten cigarettes made by hand of the same quality of tobacco would have been $2\frac{3}{4}d.$

The appellant was a member of the Amalgamated Cigarette and Tobacco Cutters Union, and it was admitted by him that he purchased the cigarettes for the purpose of ascertaining whether they were hand-made or not, and with a view to eventual legal proceedings, and not in the belief that they were made by hand, nor with the object of purchasing hand-made cigarettes for resale or consumption. It was admitted by the respondents that the cigarettes were not made by hand.

It was not suggested that the quality of the tobacco used by the respondents was inferior to what it should have been; the complaint was founded on the method of manufacture only.

The cigarettes sold to the appellant were produced, and upon examination appeared to be well and evenly made for all smoking purposes.

It was proved that they were made for the respondents by a newly invented or improved machine, called Barron's machine, and that the same qualities of paper and starch were used in their making as would have been used if they had been made by hand and in the same quantities.

The magistrate found as a fact that the cigarettes made by

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description, statement, or other indication, direct or indirect, ...

"(c) As to the mode of manufacturing or producing any goods . . . .

"The expression 'false trade description' means a trade description which is false in a material respect as regards the goods to which it is applied . . . .

"The expression 'goods' means anything which is the subject of trade, manufacture, or merchandise."

Barron's machine were as pure and clean in point of material, and as proper in point of construction for all smoking purposes, as they could have been if hand-made.

It was also proved that the printed label, complained of as containing a false trade description, within the meaning of the Merchandise Marks Act, was one of a parcel of two million labels for the ten-cigarette size of packet, which had been printed for, and used by, the respondents, before their adoption of Barron's machine, and while they still made their cigarettes by hand only, and that the respondents had continued to apply the remaining stock on hand (about half a million) of these labels to the ten-cigarette packets, while since their adoption of Barron's machine they had printed and used, for all larger sized packets, new labels, in which the term "hand-made" was omitted.

The magistrate was satisfied that in their continued use of the old ten-cigarette labels, after they had ceased to make cigarettes by hand, the respondents were actuated merely by a spirit of petty economy, that prompted them to utilise the large remaining stock of labels, which they had already paid for, and thereby to save the cost of printing an equivalent number of new ones, and held that there was no intention to deceive the buyer, or to induce him to purchase goods which he would not have purchased if the description in question had been omitted from the label.

And as a matter of law the magistrate held that the words on the label attached to the packet of cigarettes constituted a trade description applied to goods, within the meaning of the Merchandise Marks Act, in which goods are defined as embracing for the purposes of the Act anything which is the subject of trade, manufacture, or merchandise.

And, whereas a false trade description is defined by the Act to mean a trade description which is false in a material respect as regards the goods to which it is applied, the magistrate held that in determining whether the label in question constituted a false trade description, within the meaning of the Act, he was to interpret the terms of the statute in strict reference to the relation borne by the truth or falsehood of the description

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to the special and essential qualities and functions of the manufactured article, and he held that the label, although untrue in point of fact as a trade description, was not a false trade description in any material respect as regarded the cigarettes sold to the appellant, within the meaning of s. 3 of the Merchandise Marks Act, and he therefore held that the respondents had not been guilty of any offence under the Act, and dismissed the information.

The question for the opinion of the Court was, whether upon the facts aforesaid the magistrate ought to have convicted the respondents. (1)

Corrie Grant, for the appellant, read the case.

The Court then called on

Avory, for the respondents. By s. 3, sub-s. 1, of the Merchandise Marks Act, 1887, "False trade description" is defined as "a trade description which is false in a material respect as regards the goods to which it is applied," and it is for the magistrate to determine, under the special circumstances of each case, whether that which is charged as a false trade description is in fact material. That is a question of fact, on which this Court cannot overrule the finding of the magistrate. Here the magistrate in the first instance treated the question as purely one of fact, and refused to state a case, and this case was afterwards stated in obedience to a rule for the purpose granted by a Divisional Court. It is true that the magistrate has set out in the case his reasons for finding as he did, but this does not alter the nature of the question, or make it any the less a question of fact. The appellant was supplied with cigarettes which were as good as, or perhaps even better than, what he intended to buy, and therefore the description applied to the goods, not being in any way calculated to injure or deceive the purchaser, is not material, within the meaning of the Act.

(1) The case came on for argument before Wright and Darling JJ. on March 17, 1898, and was part heard, when the Court expressed an opinion that it was desirable that the point raised should be considered by a Court consisting of a larger number of judges, and adjourned the case for that purpose.

[LORD RUSSELL of KILLOWEN C.J. It would seem to follow from the respondents' contention that a trader, who knowingly sold American hams as Yorkshire hams, would be entitled to have the charge against him dismissed, if he could succeed in satisfying the magistrate that the American hams, which he sold, were as good as Yorkshire, although the purchaser bought and paid for the hams because he believed they were Yorkshire hams.]

It is found in the case that the appellant did not buy the cigarettes in the belief that they were made by hand. The question is one of degree, depending on the circumstances. In *Starey* v. *Chilworth Gunpowder Co.* (1) Lord Coleridge C.J. said: "This was a false description, used in order to save their contract, and avoid the penalties, and any loss which they might incur through the Government buying in against them. They broke their contract in using the trade-mark, and there was an intent to defraud, for what they did was done in order to save their contract, and to make the Government believe that they had an article which they had not." (2) In the same case Mathew J. said: "The words 'without intent to defraud' apply to cases where a person uses a particular mark without any intent in so doing to induce a buyer to accept goods which might otherwise be rejected." (3)

[WRIGHT J. That case arose under a different sub-section.]

The expressions used shew that the question of intent may be important with regard to the question of materiality. [He also referred to *Gridley* v. *Swinborne*. (4)]

LORD RUSSELL of KILLOWEN C.J. The question for the opinion of the Court comes before us on a case which is very carefully stated, and we are requested to express our opinion upon the question submitted to us, namely, whether, upon the facts stated in the case, the magistrate ought to have convicted the respondents. The charge against the respondents is made under s. 2, sub-s. 2, of the Merchandise Marks Act, 1891 (50 & 51 Vict. c. 28), by which "Every person who sells . . . .

(1) (1889) 24 Q. B. D. 90.
(2) 24 Q. B. D. at p. 96.
(3) 24 Q. B. D. at p. 97.
(4) (1888) 5 Times Rep. 71; 52 J. P. 791.

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any goods or things to which any . . . . false trade description is applied . . . . shall, unless he proves—

"(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the . . . . trade description; and

"(*b*) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

"(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act."

The case finds that "The respondents sold to the appellant, for the sum of $2\frac{1}{4}d.$, ten cigarettes in a packet to which a printed label had been affixed, 'Ten cigarettes guaranteed hand-made by experienced workmen.' The ordinary price for ten cigarettes made by hand of the same quality of tobacco would have been $2\frac{3}{4}d.$," or, in other words, it is found that hand-made cigarettes are $\frac{1}{2}d.$ dearer for the packet of ten than the machine-made cigarettes which were sold by the respondents. The case further states that "it was admitted by the respondents that the cigarettes were not made by hand." The magistrate held, and in my opinion rightly held, that the words of the label attached to the packet of cigarettes constituted a trade description applied to goods, within the meaning of the Act, and he also held that the label was untrue in point of fact as a trade description, and he further proceeds to explain that the cigarettes were made by a machine, with the result that they "were as pure and clean in point of material, and as proper in point of construction, for all smoking purposes, as they could have been if hand-made." The magistrate further held "that there was no intention to deceive the buyer, or to induce him to purchase goods which he would not have purchased if the description in question had been omitted from the label," and he also held that the label was not a trade description which was false in any material respect, as regarded the cigarettes sold, within the meaning of s. 3. Therefore he finds

that there was a false trade description, and that it was applied to goods, but that it was not material under the circumstances which he sets out. Now if the magistrate had contented himself with merely the finding of fact, probably we should have felt bound to hold that we could not go behind his finding; but he has (and in my opinion rightly) set out the grounds on which he has acted, and the reasons on which he has arrived at his conclusion. It comes to this, that he has applied what may be called the doctrine of equivalents, that is, he has found that the buyer got what was quite as good an article as that which he asked for, and therefore that there was no trade description which was false in a material respect. We have to determine, on the case stated for our consideration, whether this trade description, which is found to be untrue in point of fact, was false in a material respect, within the meaning of the Act, or was, as the magistrate has held, immaterial. For this purpose we must refer to the scheme of the Act. Sect. 2 enumerates certain acts which are defined as offences against the Act, and it then proceeds to point out in each case how the party charged may meet the charge which is brought against him. If the charge is brought under sub-s. 1, he may meet it by proving that he acted without intent to defraud, and if he does so he has met the onus which is cast upon him by that sub-section. Where the charge is made under sub-s. 2, there are two ways by which the charge can be met: first, by proving the facts stated in clauses (*a*) and (*b*) of the sub-section, so that, if the goods came to him with the trade-mark on them, and he proves that he took all reasonable precautions, and had no reason for suspicion, and that he gave all the information in his power, he is entitled to an acquittal; or further, he can clear himself by proving "that otherwise he had acted innocently." Under this sub-section also the onus is cast upon the person charged, and he can satisfy it in either of these ways. The next question to be considered is as to the materiality of the description. The Act of Parliament is aimed at giving the buyer protection, and s. 3, sub-s. 1, is framed so as to protect him, not only "as to the number, quantity, measure, gauge, or weight, of any

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goods," which is effected by clause (*a*), but also, by clause (*b*), "as to the place or country in which any goods were made or produced," and, by clause (*c*), "as to the mode of manufacturing or producing any goods," by clause (*d*), "as to the material of which any goods are composed," and, by clause (*e*), "as to any goods being the subject of an existing patent, privilege, or copyright." The section goes on to define a "false trade description" as "a trade description which is false in a material respect as regards the goods to which it is applied." It is said that the present case does not come within that definition, because the purchaser got an article which was as good as that which he asked for, but if once what I may call the doctrine of equivalents is to be admitted, I can see no answer to the illustration which I put in the course of the argument, which was that of a man selling American hams as Yorkshire hams, who, according to the respondents' contention, would be entitled to an acquittal, if he were able to shew that, as a matter of fact, American hams were as good as, or better than, Yorkshire hams; and the same doctrine would equally apply to other commodities, for instance, butter, or cheese, or cigars. I cannot think that the Legislature can have contemplated that to prove the goods supplied to be of a quality equal to those ordered, should afford an answer to such a charge as that made in the present case. There are people who think that hand-made cigarettes are better than those made by a machine, and they are entitled to be supplied with what they ask for and pay for; or again a person may call for hand-made cigarettes for different reasons, independent of the question of quality, as, for instance, from a desire to encourage and support the industry of hand-workers. All these considerations combine to shew that it is impossible that the ground on which the magistrate decided can be right. He thought that if the thing supplied was as good in quality as that which was asked for there was no offence against the Act; but that view cannot be supported, for the buyer is entitled to know what he is buying, and to have that which he orders and pays for. For these reasons I am satisfied that this trade description is not immaterial. There is one other point, and I

agree that it is open on the case as stated. Counsel contends that, under s. 2 of the Act, he is entitled to succeed, on the ground that the respondents acted innocently; but I cannot accept that view, for it is clear that what they did was done deliberately, and they themselves have explained how it came to be done, their object being, as the magistrate has found, to utilise the stock of labels which they had already paid for, and so save the cost of printing new labels. For the reasons which I have stated I have come to the conclusion that the case must go back to the magistrate, with an intimation of the opinion of the Court that, on the facts stated, he ought to have convicted the respondents. It will be for him to take into account the facts of the case, and to apply his judgment, and exercise his discretion as to what penalty ought to be imposed under the circumstances.

HAWKINS J. I entirely agree. It strikes me that the materiality of the trade description cannot be made dependent on a comparison of the quality of the goods supplied to the purchaser with that of other goods.

DAY J. concurred.

WILLS J. I am of the same opinion. The magistrate has found that there is a difference, amounting to about 20 per cent., between the market price of machine-made cigarettes and that of similar cigarettes made by hand. How then can it possibly be said that the description "hand-made" was immaterial? The magistrate finds the misdescription immaterial, but he states a fact which makes his finding impossible: that the label was untrue in point of fact as a trade description. He considers that the article supplied was as good as what was asked for, but it is a different article, and one which the buying public think not so good by 20 per cent. of the price.

WRIGHT J. concurred.

Judgment for the appellant.
Case remitted.

Solicitors for appellant: *Radford & Frankland.*
Solicitors for respondents: *Lewis & Lewis.*

P. B. H.

1898
April 22.

HASLUCK *v.* CLARK.

Bankruptcy—Administration of Estate of Deceased Debtor—Execution—Rights of Execution Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.

An order for the administration of the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of s. 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain the benefit of his execution against the trustee of the debtor's estate in cases in which he has not completed the execution before the date of the administration order.

TRIAL before Wright J. without a jury.

On October 11, 1897, judgment was recovered by one Isabella Clark in an action against Joseph Metz for 4488*l.* 18*s.* 3*d.* On October 18 Metz died. On October 22 the goods of the deceased judgment debtor were seized under a writ of fi. fa., but were not sold. On November 3 letters of administration were granted to the debtor's widow. Subsequently the creditors of the deceased resolved to petition for an order for the administration of the estate of the deceased under s. 125 of the Bankruptcy Act, 1883. A firm of Moss & Bodascher, who were the largest creditors, presented a petition in accordance with that resolution, and on November 19 an administration order was made with the concurrence of the deceased's widow. Notice of that order having been given to the sheriff, he informed the execution creditor of that fact. The execution creditor threatened to hold the sheriff liable in damages if he acted upon the notice, whereupon the sheriff interpleaded, and an issue was directed, in which the official receiver was plaintiff and the execution creditor defendant, to try whether at the time of the seizure the goods seized were the property of the plaintiff as trustee of the estate of the deceased as against the execution creditor. Subsequently a Mr. Hasluck was appointed trustee in the place of the official receiver, and an order was obtained substituting Hasluck as plaintiff in the interpleader issue in the place of the official receiver.

Herbert Reed, *Q.C.*, and *M. Muir Mackenzie*, for the plaintiff. If the debtor were alive and a receiving order had been made instead of an administration order, it is clear that the goods would be the property of the trustee as against the execution creditor by virtue of s. 45 of the Bankruptcy Act, 1883 (1), the execution not having been completed by seizure and sale. And by s. 125, sub-s. 6, the provisions of Part III. of the Act (which includes s. 45) are to apply to an administration order, "so far as the same are applicable." In *Watkins* v. *Barnard* (2) Vaughan Williams J. refused to adopt the earlier opinion of Cave J. in *Ex parte Official Receiver, In re Gould* (3), to the contrary, and treated it as an open question whether s. 45 was applicable to an administration order. It is contended that the view of Cave J. was wrong. An administration order under s. 125 is equivalent to a receiving order for the purposes of s. 45.

A. T. Lawrence, *Q.C.*, and *T. Willes Chitty*, for the defendant. An administration order under s. 125 relates only to the estate of a deceased debtor. But the goods in question were no part of the estate of the deceased debtor. By the common law the goods of a judgment debtor were bound by the writ of execution from the time of its teste; now by s. 16 of the Statute of Frauds they are bound from the date of the delivery of the writ of fi. fa. to the sheriff. From the date of such delivery they cease to be part of the debtor's estate for the

(1) By s. 45, sub-s. 1, of Part III. of the Bankruptcy Act, 1883, "Where a creditor has issued execution against the goods . . . . of a debtor . . . . he shall not be entitled to retain the benefit of the execution . . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . . before the date of the receiving order. . . ."

By s. 125, sub-s. 1, "Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy."

Sub-s. 6: "With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

(2) (1897) 4 Manson, 221.

(3) (1887) 19 Q. B. D. 92.

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purpose of s. 125. The dictum of Cave J. in *Ex parte Official Receiver, In re Gould* (1), to the effect that s. 45 is inapplicable to the case of an administration order is sound. The reasoning which led him and the Court of Appeal in that case to hold that s. 47 was inapplicable to such an order applies with equal force to s. 45.

WRIGHT J. If this case were free from authority I confess that my own judgment would be against the defendant's contention, for I cannot help thinking that for these purposes the goods seized by the sheriff remained the property of the deceased person or of his personal representative, and that all that was transferred to the execution creditor was a security upon them. But I cannot disregard what was said by Cave J. in *Ex parte Official Receiver, In re Gould.* (1) His dictum was not questioned in the Court of Appeal, and ought to bind me sitting here. I do not say that I feel strongly enough about it to question its correctness; I simply feel the same doubt that was felt by Cave J. All he says is that s. 45 seems inapplicable. I think I ought to follow that opinion, and leave the question, which is an important one, to be settled elsewhere. Therefore my decision must be that the goods are not the property of the trustee as against the execution creditor.

Judgment for defendant.

Solicitors for plaintiff: *Goldbergs & Langdon.*
Solicitors for defendant: *Thomas White & Son.*

(1) 19 Q. B. D. 92.

J. F. C.

PAYNTER *v.* WATSON.

1898
May 9.

London Building Act, 1894—*Rebuilding on Old Site—Certified Plans of Old Building*—57 & 58 *Vict. c. ccxiii., s.* 43.

By s. 43 of the London Building Act, 1894, a person who is desirous of building a domestic building on the site of a domestic building existing at the passing of the Act may submit to the district surveyor for certification "plans shewing the extent of the previously existing domestic building in its several parts," and on getting a certificate of the accuracy of the plans may build without regard to the restrictions imposed by the Act upon the erection of new buildings, provided he does not deviate in any respect from the certified plans:—

Held, that the plans which he must get certified under that section as a condition of the right of so building are not confined to ground-plans, but include plans shewing sections and elevations and the areas of the several floors.

CASE stated by a metropolitan police magistrate.

The appellant was the owner of certain houses, Nos. 12 and 13, Grafton Street. The respondent was the district surveyor of the district of St. George's, Hanover Square North.

The appellant having determined to pull down and rebuild the above houses, on June 25, 1897, prepared certain plans of the old buildings shewing the basement, ground-floor, first, second, third, and fourth floors, and sections and elevations thereof, which were certified by the respondent as correct under s. 43 of the London Building Act, 1894. On August 15 plans of a building proposed to be erected on the site of the old buildings were sent in by the appellant to the respondent, who served the appellant under s. 150 of the Act with a notice of objection stating that the intended domestic building would be in contravention of s. 43 (1) of the said Act, since it was

(1) By s. 43 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), "Where any person intends to erect a domestic building .... abutting upon a street on the site of domestic buildings existing at the commencement of this Act ....

"(1.) It shall be lawful for such person before commencing to erect the intended domestic building to cause to be prepared plans shewing the extent of the previously existing domestic building in its several parts .... and to cause such plans to be submitted to the district surveyor, who shall (if reasonably satisfied with the

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proposed in erecting such building to deviate from the plans certified by him of the domestic buildings existing on the site at the passing of the Act. From that objection the appellant appealed to the police magistrate. At the hearing of that appeal it was proved that the plans of the proposed buildings shewed that the extent of land to be occupied by the new buildings was not greater than that occupied by the previously existing buildings as certified by the respondent. It was also proved that the new plans deviated in several respects both as to height of the buildings and cubic space occupied, and as to the dimensions of the various rooms, from the plans of the previously existing buildings. A comparison of the new and old plans, which formed part of the case, shewed that although no portion of land was to be occupied by the proposed new buildings which was not occupied on the basement floor by the old buildings, yet, whereas the old buildings receded at the rear more and more from the perpendicular in each successive floor, the proposed new buildings were to be built so as to be perpendicular at the rear, and to be of the same area in each successive floor.

It was contended by the appellant that the only plan required by the Act to be certified was a plan shewing the extent of the previously existing building in its several parts on the basement, and that sections or elevations shewing the height were

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evidence of their accuracy) certify the same under his hand, and such certificate shall be taken to be conclusive evidence of the correctness of the plans;"

"Such person may then erect the intended domestic building, but so that no more land shall be occupied by the newly erected building than was occupied by the previously existing domestic building as so certified. If such person fail to submit such plans to the district surveyor, or the district surveyor . . . . refuse to certify the accuracy of the same, such person shall in rebuilding be bound by the preceding provisions of this Act relating to domestic buildings erected after the commencement of this Act abutting upon a street formed or laid out before that date."

"(ii.) If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor, it shall be lawful for him to apply to the council, who shall sanction such deviations on such conditions as they may think fit . . . ."

unnecessary, and that the fact that other plans, sections, and elevations had been sent to and certified by the respondent in no way affected the legal position of the appellant, and that, as no more land was to be occupied by the intended building than was occupied by the old building, the appellant could rebuild without contravening s. 43, and that the notice of objection by the respondent was therefore bad.

It was contended by the respondent that in order to comply with s. 43 the appellant was bound to submit to the respondent plans of the old building shewing its extent in its several parts, including the height, width, and depth thereof, and that he was not entitled to deviate in any way from the said plans without the consent of the London County Council or of the tribunal of appeal. The magistrate being of opinion that the respondent's contention was correct, dismissed the appeal subject to a case for the opinion of the Court.

Macmorran, Q.C., and *Poyser*, for the appellant. The plans which are to be certified under s. 43 are the ground-plans only. The words "in its several parts" do not refer to the different floors of the building, but are intended to include any possible outlying portions in the yard at the rear. The fact that the appellant submitted for certification plans of the upper floors which he need not have submitted does not amount to any estoppel. Having got his plans certified, the building owner may proceed to erect his new building, and, subject to limit as to height imposed by s. 47, the only limitation upon his power of erecting it as he pleases is that "no more land shall be occupied by the newly erected building than was occupied by the previously existing domestic building as so certified." The section was intended to give to a person building on the site of an old building a dispensation from the provisions of s. 41 as to the minimum air-space to be left at the rear of a new building.

Avory, and *Daldy*, for the respondent. Sect. 43 forms one of a group of sections (ss. 41–52) headed, "Open spaces about and height of buildings." The words "in its several parts" refer to the upper floors as well as to the ground-floor, and are

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inserted to enable the surveyor to ensure that the rebuilding shall not diminish the air space previously existing. If the building owner wants to encroach upon that air-space, he must first get the permission of the county council. The words "so that no more land shall be occupied" do not cut down the effect of the earlier part of sub-s. 1. They were probably inserted out of superabundant caution, and not with the object of allowing the builder to build at his discretion in all other respects.

WILLS J. I cannot bring myself to entertain any doubt whatever about this case. The question depends on what is meant by the words "plans shewing the extent of the previously existing domestic building in its several parts" in s. 43, sub-s. 1. In my opinion, those words would be an extraordinary phrase to employ if intended to refer to the ground-plan of the building only. That would not be the natural meaning of the words. It seems to me clear that what the building owner is to get certified by the surveyor is a complete set of plans which shew exactly what the old building was in its several floors. And the reason of that was this, that if a person has got an existing building so constructed that if it were a new building it would infringe against many of the provisions of the Act, and chooses to rebuild it exactly like the old one, he gets the protection of the section. And the language of sub-s. 2, which provides that "If a person erecting the intended domestic building shall desire to deviate in any respect from the plan or plans certified by the district surveyor" he must get the consent of the county council, makes it more abundantly clear what was the nature and object of the plans which were to be submitted for certification. The word "deviate in any respect" cannot possibly be read as confined to a deviation in the one particular respect of occupying different spaces of ground. They mean what they say, that if he deviates in any respect he must get the necessary authority for that deviation. There does not seem to be anything unreasonable in that. One knows that all legislation on this subject necessarily involves a considerable interference

with the rights of private property. It is for the benefit of the general public in large cities that there should be a great amount of interference of that kind, and the only question is, What is the extent of that interference? I cannot doubt that the magistrate has put the right construction upon s. 43, and that its real intention is that if the building owner desires in any respect to alter the old building in area, character, or outline, or in any way so as to impose a greater burden on those persons who are affected by the building, he is to submit to the jurisdiction of the county council, who are to give or withhold their permission according as they consider proper in the public interests.

KENNEDY J. I am of the same opinion. The first sub-section of s. 43 is intended to carry out the parliamentary purposes specified in the marginal note to the section, "Saving for certain domestic buildings on old sites." If a man has an old building and wishes to build on its site, he has first of all to prepare "plans shewing the extent of the previously existing domestic building in its several parts." Those plans are not confined to any ground-plans or basement plans, but are plans shewing every part of the building in every direction in which it extends. The argument of the appellant would have had no colour at all had it not been for the second paragraph of sub-s. 1, which provides that when he has got his plans certified he may "erect the intended domestic building, but so that no more land shall be occupied by the newly erected building than was occupied by the previously existing domestic building as so certified." It may be, as Mr. Avory has suggested, that that proviso was inserted merely ex abundanti cautelâ; but I am inclined to think that it was intended to meet the case of a building being erected in all other respects in accordance with the certified plans, but extending some two or three inches beyond the area shewn on the plans—in which case it might be contended that there was substantially no deviation from the plans; and I think it was intended to lay down that, so far as the occupation of a greater space of ground was concerned, no deviation from the certified plans, however small,

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could be considered as too trivial to require the consent of the county council.

Appeal dismissed.

Solicitors for appellant: *Sandilands & Co.*
Solicitor for respondent: *Blaxland.*

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COLE *v.* LANGFORD.

Practice—Judgment obtained by Fraud—Fresh Action to set aside Judgment—Jurisdiction.

Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside.

MOTION for judgment in default of pleading.

The plaintiff's statement of claim alleged that in an action brought in the Queen's Bench Division, in which the present defendant was plaintiff and the present plaintiff and one Baker were defendants, tried before Wright J. and a jury, judgment was given on July 15, 1896, that the defendant should recover against the plaintiff the sum of 53*l.* and costs; that the said judgment was obtained by the defendant by fraud in exhibiting to the Court and jury certain false and counterfeit documents purporting to be letters written by the defendant to Baker, or by Baker to the defendant, as and for genuine letters passing between the defendant and Baker, and also in exhibiting to the Court and jury certain memorandum books containing false and fraudulent entries touching the matters in issue in the action, which letters and books he so exhibited with intent fraudulently to influence the judgment of the Court and to procure the jury to give a verdict for the defendant, as in fact they did; and that the said verdict and judgment were procured by means of the said fraud of the defendant and not otherwise; and the plaintiff claimed that the same should be set aside.

The defendant having made default in delivering a defence, the plaintiff moved for judgment under Order XXVII., r. 11.

Gregson Ellis, for the plaintiff. As the defendant does not appear in opposition to the motion, the plaintiff is bound to call the attention of the Court to certain cases which seem to raise a doubt whether the present action will lie. In *Flower* v. *Lloyd* (1) an action was brought for infringement of a patent, and judgment was recovered by the plaintiff; but that judgment was reversed by the Court of Appeal, on the ground that the facts shewed no infringement. Subsequently the plaintiff applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was the only material evidence before the Court as to the nature of the defendant's process, examined the defendant's works, the defendant fraudulently concealed from him certain parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the plaintiff. The Court of Appeal (Jessel M.R., James and Baggallay L.JJ.) dismissed the application on the ground that they were a court of appellate jurisdiction only, and had no original jurisdiction, and that there was no appeal before them. But they intimated that the plaintiff had a remedy by substantive action brought to impeach the judgment. The plaintiff accordingly brought such an action. It was tried before Bacon V.-C., who found the fraud proved, and set the judgment aside. On appeal (2) by the defendant to the Court of Appeal (James, Baggallay, and Thesiger L.JJ.), the judgment of Bacon V.-C. was reversed on the ground that the fraud was not proved. But James L.J. added the following observations, in which Thesiger L.J. concurred, Baggallay L.J. dissenting: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's-length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process, had

(1) (1877) 6 Ch. D. 297. (2) (1878) 10 Ch. D. 327.

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been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or the other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury; and so the parties might go on alternately ad infinitum." The expressions of those doubts, however, cannot outweigh the more positive opinions of Jessel M.R. and Baggallay L.J. the other way. And down to the date of that case no doubt seems to have been entertained that a decree obtained by fraud could be impeached by bill: see the judgment of Jessel M.R. in *Flower* v. *Lloyd*. (1) In the later case of *Baker* v. *Wadsworth* (2), where the plaintiff brought an action to have a judgment set aside on the ground that the defendant fraudulently obtained the judgment by means of perjury, and on the defendant failing to deliver a defence moved for judgment on the statement of claim, the Court indeed refused to set the judgment aside, but they did so apparently in the exercise of their discretion, and not because they had no jurisdiction to do so.

No counsel appeared on the other side.

RIDLEY J. I think you are entitled to judgment.

PHILLIMORE J. I am of the same opinion. There are several cases since *Flower* v. *Lloyd* (3) in which this jurisdiction has been exercised, notably the case of *Priestman* v. *Thomas*. (4)

Judgment for the plaintiff.

Solicitor for plaintiff: *A. H. Holmes.*

(1) 6 Ch. D. 297.
(2) (1898) 67 L. J. (Q.B.) 301.
(3) 10 Ch. D. 327.
(4) (1884) 9 P. D. 210.

J. F. C.

[IN THE COURT OF APPEAL.]

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ATTORNEY-GENERAL *v.* STRANGE.

Estate Duty—Property Settled by Husband or Wife—Exemption—Postponement —Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 5. (1)

Property belonging to a wife was settled upon trust to pay the income to the husband for life, and after his death to the wife for life, and after the decease of the survivor of them upon the following trusts: if the wife should survive the husband, then after his decease upon trust for her absolutely; but if she should die in his lifetime, then after his decease upon such trusts as the wife should by will appoint, and in default of appointment for her statutory next of kin. The husband died after the Finance Act, 1894, came into operation, leaving his wife surviving:—

Held (reversing the decision of Vaughan Williams and Kennedy JJ.), that s. 21, sub-s. 5, of the Act did not apply to a case where the survivor of the husband and wife became on the death of the other entitled, not to the income only, but to the corpus of the property settled, and that upon the death of the husband estate duty became payable by the wife upon the principal value of the property settled.

THIS was an appeal by the Crown from a decree made by the Divisional Court (Vaughan Williams and Kennedy JJ.), declaring that upon the death of James N. Strange estate duty under the provisions of the Finance Act, 1894, did not become payable by the defendant Charlotte M. Strange, his widow, upon the principal value of all property coming within the terms of and bound by the covenant to settle after-acquired property of Charlotte M. Strange contained in her marriage settlement as property passing on the death of James N. Strange within the meaning of that Act.

By the marriage settlement dated January 14, 1846, made on the marriage of Mr. and Mrs. Strange, certain personal property to which Mrs. Strange was then entitled was settled upon trust for Mr. Strange for life, then for Mrs. Strange for

(1) The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 21, sub-s. 5: "Where a husband or wife is entitled, either solely or jointly with the other, to the income of any property settled by the other under a disposition which has taken effect before the commencement of this part of this Act, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor."

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life, and then upon the usual trusts in favour of the issue of the marriage, with the usual limitations in default of children attaining a vested interest.

In this settlement was a covenant by the intended husband and wife that any property to which Mrs. Strange then was or during the intended coverture she or Mr. Strange in her right should become entitled, to the value of 200*l.* or upwards (other than a life interest only, and other than specific chattels not producing income, and besides the trust premises thereinbefore settled), the same should be assigned to the trustees or trustee for the time being, upon trust to lay out the same upon such stocks, funds, and securities as mentioned in the settlement, and that the said stocks, funds, and securities and the income thereof should be held by the trustees or trustee upon trust to pay the income thereof to the husband or his assigns during his life, and after his decease upon trust to pay the income to the wife or her assigns for her life, and after the decease of the survivor of the husband and wife upon the trusts following—that was to say, if the wife should survive the husband, then after his decease in trust for the wife, her executors, administrators and assigns; but if the wife should die in the lifetime of the husband, then after his decease upon such trusts as the wife should, notwithstanding coverture by will or codicil, appoint, and in default of appointment in trust for the persons who at her decease would have been entitled thereto as her next of kin under the statutes for the distribution of the effects of intestates, if she had died possessed thereof intestate and without having been married.

Mrs. Strange during the coverture acquired property which was vested in the trustees of the settlement, and was represented by a sum of above 17,000*l.* stock of the Metropolitan Board of Works.

Mr. Strange died on November 1, 1894.

Mrs. Strange having disputed the right of the Crown to estate duty on this sum, the Attorney-General filed an information to recover it, praying (1.) that it might be declared that on the death of J. N. Strange estate duty became payable under the Finance Act upon the principal value, to be ascertained as

in the Act provided, of all the property coming within the terms of and bound by the above covenant. Vaughan Williams and Kennedy JJ. decided that duty was not payable as claimed by the information. The present appeal was then brought.

Sir R. E. Webster, A.-G., Sir R. B. Finlay, S.-G., and *Vaughan Hawkins*, for the appeal. This case turns on s. 21, sub-s. 5, of the Act. Sect. 1 deals with all property that passes on the death of any person. Sect. 2, sub-s. 1, provides that property passing shall be deemed to include (inter alia), (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased. It is not disputed that so far duty is imposed; but it is contended that this is met by s. 21, sub-s. 5. But that clause cannot apply where the survivor takes the corpus and not only the income. This is made clear by the provision that the duty shall not be payable till the death of the survivor. The clause manifestly deals with property held in trust subject to successive limitations. If the wife succeeds to the income in her own property on the death of her husband, she is not to pay duty then, but the duty is to be postponed. The judgment below gives two meanings to "income" in different parts of the clause. That word in the clause is used in opposition to "property," for the clause says, "the income of any property," and it must receive the same meaning throughout.

Dicey, Q.C., and *Butcher, Q.C.*, for the respondents. The contention of the appellant requires the insertion of the words "only" or "as such" after the words "becomes entitled to the income" in s. 21, sub-s. 5. The words ought to be read as they stand. The wife does not any the less take the income because she takes the capital also. The husband took the income only; on his death the wife took the income plus the capital. Suppose the husband had settled property on himself, wife, and children, giving a life interest to himself, then to his wife, then giving the corpus to such children as attain twenty-one, with ultimate gift to the survivor of husband and wife. He then dies, leaving his wife and infant children only surviving. The wife takes the income and something more, namely,

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a reversionary interest liable to be defeated by the children coming of age. Can it be said that she must pay duty at once? Suppose then the children died under age, could that make duty become payable?

LINDLEY M.R. To my mind the interpretation of s. 21, sub-s. 5, of the Act is plain, and I am somewhat astonished that there should be any difference of opinion about it. But for the view taken by the learned judges in the Court below I should have thought it too clear for argument.

The settlement provides for vesting certain personal estate in trustees upon trust for the husband for life, and after his decease for the wife for life, which latter limitation cannot in any possible event have any operation, for the settlement goes on to provide that if the wife survives then the property is to be held for her absolutely. The life estate to her, therefore, cannot take effect. If she dies in his lifetime she clearly cannot have a life estate; if she survives him, then she takes absolutely. She did survive him, and thereupon she became absolutely entitled to the trust fund. She says to the trustees, "I am entitled to the property; give it to me"; and they are ready to do it. They obviously have no choice in the matter. If she were to bring an action against them to compel them to transfer the funds they would clearly have to pay the costs.

Now we turn to the Finance Act. I do not go through the operative sections. It is agreed that ss. 1 and 2 cover the case. Then comes the question whether, on the true construction of s. 21, sub-s. 5, there is any exemption from or postponement of the duty. [The learned judge read the sub-section.]

Now apply that to the events which have happened here. The husband who became entitled to the income of the property under this settlement is dead, and on his death his wife has not become entitled to the income, she has become entitled to the whole property. Then it is said that if a person becomes entitled to the whole property he is not the less entitled to the income of it. Of course he is entitled to the income of it; but in this sub-section "income" is used in opposition to "property," and "income" means the income alone as distinguished

from the property. You cannot construe the expression "income of property" in any other sense. If other sections of the Act are looked at it will be found that "income of the property" is used by way of contradistinction from "corpus." If you look at the definition clause, s. 22, although you do not find a definition of "income," you find a definition of "property" which comprises corpus and capital. It is true in a sense that upon the death of the husband this lady became entitled to the income of the property because she became entitled to the corpus; but that is not the sense in which the word "income" is used in this sub-section. I think the appeal must be allowed with the usual consequences.

RIGBY L.J. I am of the same opinion. However clumsily this settlement is worded, the meaning of it cannot be open to doubt. In the event which happened of the husband dying first, the wife surviving became entitled to the after-acquired property absolutely. That is the event we have to consider. When we come to s. 21, sub-s. 5, upon which an ingenious argument has been based, it appears to me reasonably plain that the case there contemplated is that of successive titles to the income of the property: first, in the husband or wife, or in the husband and wife jointly; and, secondly, in the survivor. Such a case does not arise here, because, although there was a title to the income in the husband, there is no title to the income in the wife. You have to read "become entitled to the income of the property settled by such survivor" in a most unnatural manner to satisfy the respondents' contention, and to read it as being "become entitled to the income of the property or to the property itself." That is clearly not what was intended. I agree that the appeal must be allowed.

COLLINS L.J. I am of the same opinion, and have nothing to add.

Appeal allowed.

[A declaration was made in the terms of the first paragraph of the prayer.]

Solicitors: *Solicitor of Inland Revenue; Hunters & Haynes.*

H. C. J.

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[IN THE COURT OF APPEAL.]

STROUD *v.* LAWSON AND OTHERS.

Practice—Joinder of Plaintiffs—Separate Causes of Action—Same Transaction—Order XVI., *r.* 1.

A plaintiff in his statement of claim on his own behalf claimed damages from the defendants, who were directors of a company, for inducing him by fraud to purchase shares in the company, and stated in his particulars of the alleged fraud (among other things) that the defendants had declared and paid a dividend on the shares of the company when there were no profits; and he claimed in the same action on behalf of himself and all other the shareholders of the company a declaration that the payment of the dividend as aforesaid was ultra vires and illegal, and judgment against the defendants for repayment of the amount of the dividend to the company:—

Held, that the plaintiff was not entitled under Order XVI., r. 1, to join both causes of action in one action, as the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions within the meaning of the rule above mentioned.

APPEAL from the order of Darling J. at chambers, affirming the order of a master, refusing to strike out the statement of claim in the action.

The action was brought by the plaintiff on his own behalf, and also on behalf of himself and all other the shareholders in the Beeston Pneumatic Tyre Company, Limited, against three defendants named respectively Lawson, Bradshaw, and Jelley, and also against the said Beeston Pneumatic Tyre Company, Limited.

The statement of claim was as follows.

1. At and prior to the happening of the events hereinafter complained of the defendants, Lawson, Bradshaw and Jelley, were the directors of the said Beeston Pneumatic Tyre Company, Limited (such company being hereinafter called "the company"). The same defendants were then also the holders of a large number of shares in the company, and otherwise largely personally interested in the company.

2. At the times aforesaid the shares of the company were

quoted and selling at a very low price considerably under their face value.

3. The defendants, Lawson, Bradshaw, and Jelley, intending and contriving to defraud the public and benefit themselves, conspired together, and also separately endeavoured, by means of deceit and fraud to cheat and defraud such members of the public as could be induced to purchase shares in the company at extravagant prices and far beyond their real value. The particulars of the same defendants' deceit and fraud are as follows. (*a*) They and each of them deceitfully and fraudulently made or authorized the public statement that each share in the company was worth a figure much in excess of its face value, the worth thereof being variously stated by or with the authority of the said defendants at figures varying from 4*l*. to 20*l* both inclusive. (*b*) They and each of them deceitfully and fraudulently made or authorized the public statement that they had been offered 8*l*. per share for every share in the company, which offer they had not accepted, and advised the shareholders to refuse, because, as the said defendants deceitfully and fraudulently said or represented, the shares were respectively worth more than that sum, whereas in truth and in fact no such offer was ever bonâ fide made to them or either of them, nor were the said shares ever worth 8*l*. each or anything like that amount. (*c*) They and each of them also deceitfully and fraudulently made or authorized the public statement that they had been offered 15*l*. per share, and had had several other advantageous offers for every share in the company, whereas in truth and in fact no such offers were ever bonâ fide made to them or either of them. (*d*) On or about May 7, 1896, the defendants as directors of the company declared, and in the month of June, 1896, paid, an interim dividend of 100 per cent. (in all the sum of 30,000*l*.) on and in respect of the ordinary shares of the company, but such dividend was not, nor was any part thereof, paid out of the profits of the company, nor did the profits of the company allow of any such payment, but the said sum of 30,000*l*. was obtained by the defendants (as such directors aforesaid) from the British Motor Syndicate, Limited (of which the defendant Lawson was the chairman), and for

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which sum of 30,000*l.* the said defendants (as such directors as aforesaid) wrongfully issued to the said British Motor Syndicate, Limited, 15,000 fully paid ordinary shares in the company, namely, at the price of 2*l.* per share.

4. The plaintiff has suffered damage in that (on the faith of the making and publication by or with the authority of the said defendants, Lawson, Bradshaw, and Jelley, of the statements and declaration of the interim dividend mentioned in the last paragraph, which the said defendants intended should come to his knowledge and be acted upon by him, and the plaintiff believing that the said statements and declaration of dividend were genuine and bonâ fide) the plaintiff purchased 20 ordinary shares of the company for the sum of 161*l.* 10*s.* 6*d.*, and 100 ordinary shares of the company for the sum of 509*l.* 11*s.* 7*d.*

5. The said shares have fallen greatly in price, and the same are not and never were worth more than their face value or thereabouts.

6. The plaintiff on behalf of himself and all other the shareholders in the company repeats section (*d*) of paragraph 3 hereof, and says that the said interim dividend was ultra vires and illegal.

The plaintiff claims: 1. On his own behalf 550*l.* damages occasioned to him by the aforesaid deceit and fraud of the defendants other than the company. 2. On behalf of himself and all other the shareholders in the company a declaration that the declaration of the said dividend of 100 per cent. was ultra vires and illegal, and that the defendants (other than the company) are jointly and severally liable to make good to the company all moneys paid by them out of the company's assets on account or in respect of the said dividend, and judgment against them jointly and severally for repayment of such moneys accordingly.

The defendants applied at chambers for an order that the statement of claim should be struck out as embarrassing, unless the plaintiff elected within a certain time on which of the two causes of action mentioned therein he would proceed. The master refused the application, and on appeal the learned judge affirmed his decision.

Brooke Little, for the defendants. The plaintiff has joined two causes of action the joinder of which the rules do not permit. The plaintiff sues in two capacities, one personal and the other representative, and the case stands on the same footing as if there were two separate plaintiffs suing in one action in respect of distinct causes of action. This is inadmissible unless the case can be brought within Order XVI., r. 1, which allows several plaintiffs to join in one action distinct causes of action, if the right to relief arises out of the same transaction or series of transactions, and there would be a common question of law or fact, if they brought separate actions. That is not the case here. The two causes of action do not arise out of the same transaction. The first cause of action arises out of alleged fraudulent representations and acts done on the part of the defendants for the purpose of inducing the plaintiff to become a shareholder in the company. The second cause of action arises from the alleged illegal declaration of a dividend ultra vires. It is not sufficient that some question of law or fact should arise which is common to both causes of action. Transactions are not the same because some particular fact is an element in each. The alteration in the rules which is embodied in Order XVI., r. 1, was made to meet cases, such as occurred in *Smurthwaite* v. *Hannay* (1) and *Carter* v. *Rigby & Co.* (2), where a number of persons have similar causes of action arising out of the same transaction, as in the case of holders of bills of lading in respect of bales of cotton carried in the same ship, or persons injured by the same negligent act, in which cases the claims of the various plaintiffs may well be disposed of in the same action. It was never intended that wholly distinct and dissimilar causes of action vested in different plaintiffs should be joined in one action simply because there might be one fact common to them. The defendants in respect of the two causes of action in this case are different. The company is necessarily made a defendant in the case of the second cause of action, but the company has nothing to do with the action of fraud.

Mattinson, *Q.C.*, and *G. F. Hart*, for the plaintiff. It is

(1) [1894] A. C. 494. (2) [1896] 2 Q. B. 113.

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submitted that this case comes well within the terms of Order XVI., r. 1. The company is not substantially a defendant in the action. The only relief that is claimed is as against the directors. The improper declaration of a dividend out of capital was a transaction out of which a right to relief accrued to the plaintiff in his personal capacity, because it amounted to a false representation inducing him to become a shareholder, and a right to relief also accrued to him suing on his own behalf as a shareholder and on behalf of his fellow shareholders by reason of that declaration being ultra vires as against the shareholders. It is not necessary in order to satisfy the words of the rule that every element in both causes of action should be identical. It is sufficient if a transaction alleged gives rise to a right of relief in the case of several plaintiffs, and a common question of fact or law would therefore arise if they brought separate actions. In this case the declaration of the dividend out of capital is a fact common to both the causes of action alleged.

Brooke Little, in reply.

A. L. SMITH L.J. The question in this case is whether the plaintiff must be put to his election between the two distinct causes of action which are joined in this statement of claim. The judge at chambers, affirming the decision of the master, refused to make him elect, and against that refusal the defendants appeal. I cannot agree with the decision of the learned judge. In the first part of the statement of claim the plaintiff on his own behalf claims damages against the three defendants other than the company for having induced him to become a member of the company by various false representations. That is a common law action of deceit personal to the plaintiff. In the second part of the statement of claim he sues the same defendants and the company limited, not in his personal capacity, but in a wholly different capacity, namely, on behalf of himself and all other the shareholders in the company, on the ground that the defendants other than the company declared and paid a dividend on the shares of the company out of capital, which was ultra vires, and he claims that they should put

back the money which was so paid, not into his own pocket, but into the coffers of the company for the benefit of the shareholders as a body. This kind of action he could not bring in his personal capacity. He could only sue in a representative capacity on behalf of himself and all other the shareholders in the company, and he was obliged to join the company as a co-defendant with the other defendants on the record. Thus he is joining with the well-known common law action of deceit another kind of action altogether, well known in the Chancery Division. In my opinion these are wholly separate and distinct causes of action which do not arise out of the same transaction, or series of transactions. With regard to one of them, in respect of which the plaintiff sues in his personal capacity, he has to prove fraud. With regard to the other, in respect of which he sues in a representative capacity, he has not to prove fraud but merely that the act of the directors was ultra vires. I do not think this case comes within the terms of Order XVI., r. 1. That rule was brought into operation after the decision in *Carter* v. *Rigby & Co.* (1) The first of the cases which led to an alteration of the rules on this subject was *Smurthwaite* v. *Hannay*. (2) In that case bales of cotton were shipped by several shippers in a general ship under similar bills of lading. The total number of bales landed at the port of discharge fell short of the number shipped, but, the marks on some of the bales having been obliterated, the holders of the bills of lading were respectively in a difficulty with regard to making out where the short delivery existed, and they therefore all joined in bringing an action, alleging that collectively they were entitled to have so many bales delivered, but only a smaller number had been delivered. That was a simple case, and Lord Esher M.R. in this Court (3) was of opinion that under the old rules on the subject, if the separate causes of action or claims of the different plaintiffs all arose out of the same transaction, they might be joined in one action. There was a difference of opinion in this Court, and ultimately in the House of Lords it was held that under the then existing rules the plaintiffs could not join in one action,

(1) [1896] 2 Q. B. 113. (2) [1894] A. C. 494.
(3) [1893] 2 Q. B. 412.

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A. L. Smith L.J.

because each of them had a distinct and separate cause of action. Not long after that came the case of *Carter* v. *Rigby & Co.* (1) In that case a number of miners had been drowned through the flooding of a mine, and the personal representatives of the deceased miners joined in an action against the proprietors of the mine, alleging that the mine had been flooded through negligence for which they were responsible. It was held that the case was governed by *Smurthwaite* v. *Hannay* (2), and that the plaintiffs could not join in one action under the rules. In the case of *Peninsular and Oriental Steam Navigation Co.* v. *Tsune Kijima* (3) it was held that a number of different parties who had sustained damages by reason of a collision between two ships alleged to have been caused by the negligence of the defendants' servants could not join in one action against the defendants. It was to meet the difficulty which arose in such cases as these that the alteration of the rules was made. By Order XVI., r. 1, it is now provided that "all persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." According to the terms of the rule the plaintiff in this case cannot join the two causes of action which he is putting forward in different capacities, unless he can shew that they both arise out of the same transaction. It is not enough for him to shew that, if separate actions were brought, "a common question of law or fact would arise," for those words do not apply, unless the right to relief in each case arises out of the same transaction. I do not think that is so in the present case. The right to relief which the plaintiff claims on his own behalf in the first part of the statement of claim depends wholly on the existence of fraud. The right to relief which he claims in a representative capacity in the second part of the statement of claim is quite independent of any fraud on the part of the defendants. The two causes of action and the nature of the

(1) [1896] 2 Q. B. 113. (2) [1894] A. C. 494.
(3) [1895] A. C. 661.

relief claimed are wholly distinct and separate. For these reasons I think this appeal should be allowed, and the statement of claim be struck out unless the plaintiff elects between the two causes of action included therein.

CHITTY L.J. I am of the same opinion. It is clear that in this action there are in reality two plaintiffs and two causes of action. The cause of action relied upon in the first part of the statement of claim is a deceit or fraud perpetrated upon the plaintiff by the defendants other than the company whereby he was induced to purchase shares in the company. In respect of that cause of action the plaintiff sues in his personal capacity, and it is a cause of action which is wholly distinct from, and which does not in my opinion arise out of the same transaction as the cause of action relied upon in the second part of the statement of claim. That cause of action is in respect of the unlawful payment of dividends out of capital by the defendants as directors of the company. An action of that kind ought primâ facie to be brought by the company itself; but, inasmuch as a difficulty might often arise from the directors inculpated having a preponderating voice in the management of the company, in order to prevent a failure of justice, Courts of equity have allowed a shareholder to bring actions of this kind on his own behalf and that of the other shareholders, making the company a defendant in order to receive the proceeds of the suit. Accordingly in respect of this second cause of action the plaintiff is suing in a representative capacity on behalf of himself and the other shareholders. There are therefore, as I have said, in reality two separate plaintiffs suing in respect of two separate and distinct causes of action in this case. The question then arises whether both the causes of action arise out of the same transaction within the meaning of Order XVI., r. 1. That rule in its present form was framed with reference to the difficulty which arose in the cases of *Smurthwaite* v. *Hannay* (1) and *Carter* v. *Rigby & Co.* (2) It is obvious on the face of the rule that it was not thereby intended to allow any number of different plaintiffs to join in

(1) [1894] A. C. 494. (2) [1896] 2 Q. B. 113.

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Chitty L.J.

one action any number of separate and different causes of action, but that it was intended merely to effect a modification of the old rule by which a limited liberty of joining plaintiffs with separate causes of action should be conferred. The nature of the limitation is plain upon the face of the rule. It provides that "all persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule. Applying the terms of the rule to the present case, I am of opinion that the rights to relief claimed in the two parts of the statement of claim respectively do not arise out of the same transaction. I do not deal with the words "series of transactions," because they were not relied upon by the plaintiff's counsel. In the first part of the statement of claim the plaintiff is not suing as a shareholder. His claim to relief is put upon the ground that by fraudulent devices the defendants induced him to become a shareholder, one of those devices being that, as stated in paragraph 3 (*d*), they declared and paid a dividend out of capital. In the second part of the statement of claim, in paragraph 6, the plaintiff repeats section (*d*) of paragraph 3, the effect of which is to incorporate it into that part of the statement of claim without any allegation of fraud: and, so far as this cause of action is concerned, the plaintiff is suing as a shareholder on behalf of himself and the other shareholders. The mere circumstance that he makes the declaration and payment of a dividend out of capital an element in the fraud alleged as the basis of the first-mentioned cause of action does not in my opinion shew that the two causes of action arise out of the same transaction. It seems to me that they arise out of different transactions, though they have that one feature in common. It is not necessary for the present purpose

to say to what cases the rule would apply. But I mentioned during the argument by way of illustration a case where persons having separate inheritances in a graveyard had separate rights of action in respect of disturbance of graves therein by one common act. I think the rule might apply to such a case and they could therefore join as co-plaintiffs in one action. The sum of my judgment is that the separate causes of action joined in this case do not arise out of the same transaction.

VAUGHAN WILLIAMS L.J. I agree, but, having regard to the importance of the rule which we are construing, I prefer to express my reasons for concurring and my view of the meaning of the rule in my own language. I agree that in this action there are in substance two different plaintiffs, one being the plaintiff suing on his own behalf, and the other the plaintiff suing on behalf of himself and the other shareholders in the company. In other words the plaintiff is suing in two different capacities. That fact, however, does not seem to me of itself very material for the solution of the question which we have to decide, because the very object of Order XVI., r. 1, is to enable different plaintiffs with separate causes of action to join in one action. So far as the defendants are concerned, I agree with the plaintiff's counsel that substantially there is only one set of defendants, namely, the three directors, the company being only defendants in name and as a matter of machinery. I do not know whether it is very important for the purposes of the question which we have to decide, whether there are in point of form more defendants to the second cause of action in respect of which the plaintiff claims than there are to the first. If the matter be material, I think we ought to treat the action as really brought against the three directors. That being so, the question arises whether or not, having regard to the terms of the rule that has been substituted for the former rule on this subject, we ought to allow these two causes of action to be joined. It has been pointed out that the two causes of action are different, one being for deceit, and the other against directors for doing something ultra vires. I do not however understand that by the new rule it was intended to prevent the

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joinder of different causes of action under it. On the contrary I understand its object to be to facilitate such joinder, and to allow plaintiffs to join different causes of action where under the old rules as interpreted in *Smurthwaite* v. *Hannay* (1) by the House of Lords they could not do so. It is clear that the intention of the rule is to allow, subject to certain limitations, the joinder of different causes of action which have accrued to different plaintiffs. What then is the limitation subject to which such joinder is allowable? The words of the rule are, "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." I need not discuss the latter part of these words, because it is admitted by every one concerned that in this case a question common to both causes of action would arise. But that is not sufficient. The two conditions, namely, that the right to relief must arise from the same transaction and that there must be a common question of law or fact, are not alternative conditions. If that had been meant to be so, the wording of the rule would certainly have been different, as for instance by the insertion of the simple word "or" before the word "where." We have therefore only to deal with the question whether there is a fulfilment of what is undoubtedly made by the rule a condition precedent to the joinder of different plaintiffs in respect of distinct causes of action, namely, that a right to relief should be alleged to exist in each of them in respect of or arising out of the same transaction or series of transactions. I do not think that the rule means that the whole of a transaction must be involved in each of the causes of action joined. I think that, if there was a transaction or series of transactions in respect of which one plaintiff was interested up to a certain point, and other plaintiffs were interested, not only up to that point, but in respect of the entire transaction or series of transactions from beginning to end, under this rule they might join their separate causes of action in one action, because there

(1) [1894] A. C. 494.

would be one transaction or series of transactions in respect of which the various plaintiffs all claimed a right to relief. Their remedies or damages might be different, but they would be claiming relief in respect of the same transaction or series of transactions. Having stated my view of the effect of the rule I wish to go on to point out why according to that view I think the plaintiff ought to be put to his election between the two causes of action alleged in the statement of claim by reason of the nature of the transactions out of which they respectively arise. In the first part of the statement of claim the plaintiff complains that the defendants other than the company made certain representations for the purpose of deceiving him, and that believing those representations he acted upon them and thereby suffered damage. That is the transaction upon which he is there basing his cause of action. Can it be said that the cause of action mentioned in the second part of the statement of claim, namely, that in respect of the improper declaration and payment of a dividend by the defendants as directors, is based upon the same transaction as the first cause of action? I think that it obviously cannot. I do not think that within the meaning of the rule the transaction which consisted in the improper declaration and payment of a dividend is part and parcel of the transaction which consisted in the inducement of the plaintiff by fraud to become a shareholder in the company. The allegations of fact which the plaintiff makes in the first part of the statement of claim, and which are absolutely essential to the cause of action upon which he relies, seem to me to shew that the transaction in reference to which he there complains is not the same transaction as that upon which the complaint in the second part of the statement of claim is based. In my opinion, therefore, it is not true to say that the rights to relief respectively alleged in the two parts of this statement of claim, in reality by different plaintiffs, both arise out of the same transaction or series of transactions. For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *Lewis Stroud.*

Solicitors for defendants: *Steadman & Van Praagh.*

E. L.

C. A.
1898
May 10.

[IN THE COURT OF APPEAL.]

OXLEY *v.* WILKES AND OTHERS.

Practice—Libel—Newspaper—Pleading—Payment into Court—Libel Act, 1843 (6 & 7 Vict. c. 96), s. 2.

The defendants in an action for a libel published in a newspaper pleaded by way of defence, in accordance with the Libel Act, 1843, s. 2, that the libel was published without actual malice, and without gross negligence, an apology, and payment into court of 5*l.* The jury at the trial found that the libel was published without actual malice, but not without gross negligence, and that the apology was sufficient, and they assessed the damages at 5*l.*:—

Held, that the defendants, having made the payment into court as part of a defence under the Libel Act, 1843, s. 2, and having failed at the trial on that defence, were not entitled to avail themselves of the payment into court as being made under Order XXII., r. 1, and therefore the plaintiff was entitled to judgment.

APPEAL of defendants from judgment of Darling J. at the trial.

The action was against the printer and publishers of a newspaper called the *South London Chronicle* for a libel published therein. The statement of defence was as follows. 1. The alleged libel was inserted in the *South London Chronicle* without actual malice, and without gross negligence. The said newspaper is a public newspaper, and is ordinarily published at intervals of one week. Before the commencement of this action, and at the earliest opportunity after the publication of the said libel, the defendants caused to be printed and published a full apology for the said libel according to the statute in such case made and provided in the words and letters following. [Then followed a copy of the apology.] 2. The defendants bring into court the sum of 5*l.*, and say that that sum is sufficient to satisfy the plaintiff's claim in this action. 3. Take notice that the defendants intend on the trial of this action to give in evidence in mitigation of damages the matters alleged in paragraph 1 hereof.

The jury found, in answer to questions put to them by the

learned judge, that the libel was published without actual malice, but not without gross negligence, and that the apology was sufficient, and they assessed the damages at 5*l.* Upon these findings the judge entered judgment for the plaintiff for 5*l.*

Shewell Cooper (*Rawlinson, Q.C.*, with him), for the defendants. The defendants were entitled to judgment, the verdict of the jury being that the plaintiff was not entitled to more than 5*l.* by way of damages, and that amount having been paid into court. By the Libel Act, 1843 (6 & 7 Vict. c. 96), commonly called Lord Campbell's Act, s. 2, power was given to the defendant in an action for a libel contained in any public newspaper to plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, an apology had been inserted in the newspaper, and the defendant was at liberty to pay money into court by way of amends, and such payment into court was to have the same effect and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regarded the pleading of the additional facts thereinbefore required to be pleaded by the defendant, as if actions for libel had not been excepted from the personal actions in which it was lawful to pay money into court under 3 & 4 Will. 4, c. 42. The meaning of the section was that the payment into court under it was to have the same effect and be subject to the same regulations as payment into court had, and was subject to, in actions other than libel under the rules for the time being.

The Libel Act, 1845 (8 & 9 Vict. c. 75), s. 2, made it essential to the validity of a plea under the Libel Act, 1843, that there should be a payment into court "as provided by the said Act." It was held prior to the Judicature Act, in *Lafone* v. *Smith* (1) and *Jones* v. *Mackie* (2), that a payment into court under the Libel Act, 1843, was conditional, and was not to be treated at the trial as an admission of liability. But under the practice

(1) (1859) 4 H. & N. 158. (2) (1867) L. R. 3 Ex. 1.

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existing then payment into court could not be pleaded with other pleas. The result of the Judicature Acts and Rules was that the defendant might in any action plead payment into court together with other pleas: *Berdan* v. *Greenwood*. (1) By the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 2, the provisions of s. 2 of the Libel Act, 1843, with reference to payment into court, and the words "as provided by the said Act" in s. 2 of the Libel Act, 1845, are repealed. In *Hawkesley* v. *Bradshaw* (2) it was held that the decision in *Berdan* v. *Greenwood* (1) applied to actions of libel. Order XXII., r. 1, no doubt overrules *Hawkesley* v. *Bradshaw* (2) to some extent; but it shews that the practice with regard to payment into court in actions of libel was altered by the rules under the Judicature Act under which any defences may in general be pleaded together. It is submitted that the payment into court made in this case must now be treated as made under the existing rules of practice and as having effect accordingly. Order XXII., r. 1, it is true, provides that in actions of libel or slander payment into court shall not be pleaded together with a denial of liability; but it is submitted that the defence pleaded here does not deny liability. By s. 24 of the Judicature Act, 1875, power was given to make rules modifying the provisions of previous Acts with regard to practice.

Candy, *Q.C.*, and *Arthur S. May*, for the plaintiff. The payment into court in this case was made as an essential part of the defence under the Libel Act, 1843, which failed. If the defence under that Act fails for want of proof of any of the other matters essential to it, as it did here, the payment into court becomes a nullity. It is only a conditional admission of liability, and, if it is not taken out in satisfaction, the money paid in remains the defendant's, and at the trial the liability of the defendant is not to be treated as admitted. *Lafone* v. *Smith* (3) and *Jones* v. *Mackie* (4) are still applicable. In *Harris* v. *Arnott* (5) it was held that the plaintiff could not take out money paid into court under the Libel Act, 1843, unless he

(1) (1878) 3 Ex. D. 251.
(2) (1880) 5 Q. B. D. 302.
(3) 4 H. & N. 158.
(4) L. R. 3 Ex. 1.
(5) (1889) 24 L. R. Ir. 404.

did so in satisfaction. The defendants cannot, having failed in their defence under that Act, turn round and seek to treat the payment into court as made under Order XXII., r. 1. They could only pay money into court under that rule in an action of libel so as unconditionally to admit liability.

[They also cited *Gray* v. *Bartholomew* (1); *Dunn* v. *Devon and Exeter Constitutional Newspaper Co.* (2)]

Shewell Cooper, in reply.

A. L. SMITH L.J. In this case an action of libel was brought against the defendants in respect of matter published in a public newspaper. The defendants in answer pleaded what is undoubtedly a defence under the Libel Act, 1843, inasmuch as it contains all the ingredients which are necessary to such a defence, and they brought into court a sum of money, namely, 5*l.*, as they were bound to do in order to make a good plea under the Act. On that defence the action went down to trial, and the case was fought and left to the jury. The jury found for the defendants on all the matters necessary to support their defence except one, namely, that the publication had been without gross negligence, on which they found for the plaintiff; and the defendants therefore failed to maintain their defence under the Libel Act, 1843. They thereupon turn round and seek to treat the payment into court which they made as a necessary ingredient of their defence under that Act as a general payment into court, and contend that, the plaintiff not having recovered more than 5*l.*, they are entitled to judgment. I do not think they can do this. The payment into court was a necessary part of the defence under the Libel Act, 1843, without which it would have been bad; and, if that payment into court were treated as being also a separate defence in itself under Order XXII., r. 1, then the defendants would be pleading it together with another defence to the action, which under that rule they are not entitled to do. I think the judgment of the learned judge was right, and this appeal should be dismissed.

(1) [1895] 1 Q. B. 209.

(2) [1894] Reported as a note to *Gray* v. *Bartholomew*, [1895] 1 Q. B. 211.

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CHITTY L.J. I am of the same opinion. The Libel Act, 1843, gives the defendant in an action for a libel published in a newspaper a statutory defence. If the matters which may by the statute be pleaded are proved, they amount to a defence. The defendants in this case pleaded a defence under the statute, and upon that defence the case went to the jury, who found that one of the matters essential to the defence was not proved. Consequently the defence under the Libel Act, 1843, failed. It was one of the conditions of putting in such a defence that there should be a payment into court as mentioned in the statute by way of amends, and such a payment was accordingly made. The defendants being beaten on their defence under the Libel Act, 1843, seek to avail themselves of that payment into court as a general payment into court under Order XXII., r. 1. It has been already pointed out by the Lord Justice that they cannot do this under the rules.

VAUGHAN WILLIAMS L.J. I also am of opinion that the appeal should be dismissed. I come to this conclusion on the ground that at the trial the defence was treated as pleaded under the Libel Act, 1843, and the learned counsel for the defendants has very frankly admitted that it was intended to be so pleaded. It is not necessary to my judgment to say whether, as it stands, it is a good defence under that Act, nor do I propose to express any opinion whether, if an application had been made to strike it out, it would have been successful. Speaking for myself, I am very much disposed to think that, if the defence had not been relied on as pleaded under the Libel Act, 1843, it might have been perfectly good under the Judicature Act. There is no reason why under the Judicature Act payment into court may not be pleaded in an action for libel, provided that liability is not denied. What Order XXII., r. 1, forbids is payment into court in such an action together with a denial of liability. If liability is admitted payment into Court may be pleaded in libel as in any other action. A defence does not the less admit liability because, together with such an admission, it states facts in mitigation of damages. I do not see, for instance, that the mere fact that it contains such a

statement as that an apology was made precludes the defendant from relying at the trial on the payment into court as a general payment into court under Order XXII., r. 1.

Appeal dismissed.

Solicitor for plaintiff: *T. E. Crocker.*
Solicitor for defendants: *C. W. Wedlake.*

E. L.

[IN THE COMMERCIAL COURT.]

1898
May 17, 18.

CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY, LIMITED.

Sale of Goods—Contract—Passing of Property—Bill of Exchange—Dishonour by Buyer—Bill of Lading—Indorsement by Buyer—Possession of Goods—Consent of Seller—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 19, *sub-s.* 3; *s.* 25, *sub-s.* 2—*Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 2.

Goods were sold, and shipped to the buyer, to whom the seller forwarded the bill of lading, together with a bill of exchange for acceptance. The buyer did not accept the bill of exchange, but sold the goods, and indorsed the bill of lading, to the plaintiff. The seller stopped the goods, and indemnified the shipowner.

In an action against the shipowner for non-delivery of the goods:—

Held, that, as by the Sale of Goods Act, 1893, s. 19, sub-s. 3, the buyer, not having accepted the bill of exchange, was bound to return the bill of lading, the property in the goods did not pass to him, and he could transfer no title to the plaintiff:

Held, also, that, as the consent of the seller to the possession of the goods by the buyer was conditional on the buyer's acceptance of the bill of exchange, the buyer had not obtained possession of the goods with the consent of the seller, within the meaning of the Sale of Goods Act, 1893, s. 25, sub-s. 2, and could not transfer title, under that clause, and the Factors Act, 1889, s. 2, sub-s. 2:

Held, therefore, that the plaintiff was not entitled to recover as indorsee of the bill of lading.

TRIAL of action in the Commercial Court before Mathew J.

The plaintiffs, who were indorsees of a bill of lading, sued the defendants, who were shipowners, to recover damages for the

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non-delivery of certain copper, or in the alternative for conversion of the copper. The material facts are stated, and the sections on which the case turned are set out, in the judgment, post, pp. 63–65.

May 17. *Pickford, Q.C.* (*J. A. Hamilton* with him), for the plaintiffs. The case comes within the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25, sub-s. 2, and, by virtue of that sub-section, and the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 2, the plaintiffs are entitled to the property in, and possession of, the goods, and can recover in this action. The defendants will rely on s. 19, sub-s. 3, of the Sale of Goods Act, 1893; but the effect of that sub-section is merely to reproduce in a statutory form the decision of the House of Lords in *Shepherd* v. *Harrison* (1), and it does not apply to a case which comes within s. 25, sub-s. 2, as the present case does. Sect. 25, sub-s. 2, puts the buyer in the place of a mercantile agent, who, by the Factors Act, 1889, s. 2, sub-s. 2, can transfer the property to a bonâ fide purchaser.

McCall, Q.C. (*H. Parker Lowe* with him), for the defendants. In the first place, the action must fail, because the party liable, if any one is liable, would be the steamship company into whose vessel the copper was transhipped, and not the present defendants; but, however this may be, the defendants are protected by the Sale of Goods Act, 1893, s. 19, sub-s. 3, because Pintscher wrongfully retained the bill of lading without accepting the bill of exchange, and therefore no property in the goods passed to him, and he could pass none to the plaintiffs. The consent of the sellers, Steinmann & Co., to Pintscher's obtaining possession of the goods was conditional on his accepting the bill of exchange, and, as he did not accept it, there was no consent. Therefore, the Sale of Goods Act, 1893, s. 25, sub-s. 2, does not help the plaintiffs, and s. 47 of the same Act does not carry their case any further. [He referred to *Mirabita* v. *Imperial Ottoman Bank*. (2)]

Cur. adv. vult.

(1) (1871) L. R. 5 H. L. 116.

(2) (1878) 3 Ex. D. 164.

May 18. Judgment was delivered by

MATHEW J. This is an action by the indorsees of a bill of lading against shipowners for non-delivery of goods. The facts are contained in a voluminous correspondence, but may shortly be stated as follows: Steinmann & Co., a firm carrying on business at Liverpool, sold the copper, which is the subject of the action, to Pintscher, a merchant. The copper was shipped at Swansea on board the defendants' vessel, and was to be transhipped at Bristol and forwarded to Rotterdam at 15*s.* a ton through freight, and delivered there. Steinmann & Co. forwarded the bill of lading to Pintscher, together with a bill of exchange for acceptance. The amount for which the bill of exchange was drawn was wrong, but nothing can be made of that point, because nothing was done by Pintscher to set the matter right. He was on the verge of bankruptcy, and he ought to have returned the bill of lading to Steinmann & Co., but he did not do so; he declined to accept the draft, and, in fraud of Steinmann & Co., he sold the goods and indorsed the bill of lading to the plaintiffs. Steinmann & Co. thereupon took steps to stop the goods, and they were successful, on giving an indemnity to the defendants.

The question is, Can the plaintiffs, the indorsees of the bill of lading, claim the goods? It is said that the action will not lie against the defendants, because it should have been brought against the steamship company into whose vessel the goods were transhipped; but there was but one contract of carriage, for the breach of which the defendants would be liable.

The next point arises on the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 19, sub-s. 3, by which, "where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." It is contended for the plaintiffs that this sub-section, adopting the judgment of the House of Lords in *Shepherd* v. *Harrison* (1),

(1) L. R. 5 H. L. 116.

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Mathew J.

does not apply to a case which comes within s. 25, sub-s. 2, of the same Act, as it is argued this case does. On the other hand, it was contended on behalf of the defendants that Pintscher ought to have returned the bill of lading to Steinmann & Co., as he did not accept the bill of exchange, that he acquired no property in the goods, and therefore the plaintiffs acquired no property from him. In answer to that contention, the plaintiffs' counsel directed my attention to s. 25, sub-s. 2, of the same Act, and to the Factors Act, 1889 (52 & 53 Vict. c. 45), s. 2, sub-s. 2. By s. 25, sub-s. 2, of the Sale of Goods Act, 1893, "Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." By sub-s. 3, "In this section the term 'mercantile agent' has the same meaning as in the Factors Acts." By the Factors Act, 1889, s. 2, sub-s. 2, "Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent; provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined." By s. 1, sub-s. 1, of the same Act, "The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." It is contended on behalf of the plaintiffs that the effect of these provisions is, that the buyer becomes a mercantile agent for himself, and it is said that in the present case the buyer, Pintscher, obtained posses-

sion of the bill of lading, and that, by virtue of s. 25, sub-s. 2, of the Sale of Goods Act, 1893, the bill of lading conveyed the title to the indorsees, the plaintiffs. It is contended for the defendants that the important words in s. 25, sub-s. 2, of the Sale of Goods Act are, "with the consent of the seller," and that here there was no such consent. I am of opinion that Pintscher was not entitled to deal with the goods in any way. He had the custody of the bill of lading, which he ought, under the circumstances, to have handed back to Steinmann & Co., but he had not possession of the document of title with the consent of the seller. The case is the same as where a banker instructed to hold a bill of lading until payment for the goods is made in cash parts with the document to the consignee without receiving cash. The property in the goods does not pass, and an indorsement of the bill of lading gives no title to the goods. The defendants are entitled to judgment.

Judgment for the defendants.

Solicitor for plaintiffs: *Richard White, for E. M. Clason Dähne, Swansea.*

Solicitors for defendants: *Woodcock, Ryland & Parker, for Forshaw & Hawkins, Liverpool.*

P. B. H.

1898
May 16.

NORTH EASTERN RAILWAY COMPANY, APPELLANTS *v.* OVERSEERS OF THE POOR OF THE PARISH OF DALTON AND ASSESSMENT COMMITTEE OF THE THIRSK UNION, RESPONDENTS.

Highway—Rate—Exemption—Liability to repair Ratione Tenuræ—Alteration of Highway—Estoppel—Res judicata—Decision quashing previous Rate—Highway Acts, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 33, *and* 1862 (25 *&* 26 *Vict. c.* 61), *s.* 35.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were not leviable by reason of the exemption in the Highway Act, 1835, s. 33.

A railway company was liable ratione tenuræ to repair a highway in the hamlet.

An order was made by justices, under the Highway Act, 1862, s. 35, that all the highways in the hamlet should be parish highways, and repaired by a highway board, and the sums to be paid by the occupiers were fixed.

The company was rated, in respect of its lands, to a rate for the expenses incurred by the highway board in repairing the highways within its district, including those in the hamlet.

The company appealed to quarter sessions against the rate, and the appeal was allowed.

By order of the Local Government Board the hamlet was detached from the township, and amalgamated with another township.

The company was afterwards rated, in respect of its lands in the hamlet, for expenses incurred by a district council, the successor of the highway board, for repair of the highway in the hamlet.

On a case stated by quarter sessions on appeal from the latter rate:—

Held, first, that the exemption under the Highway Act, 1835, s. 33, determined when by the justices' order the highway became a parish highway, and that, by that order, it was repairable by the contributions of every one in the parish, including those formerly liable ratione tenuræ, and therefore the company was liable to be rated.

Held, secondly, that the order of quarter sessions quashing the first rate did not operate as an estoppel, so as to preclude the sessions from deciding that the company was liable to be assessed to the second rate.

CASE stated by the quarter sessions for the North Riding of Yorkshire, upon the hearing of an appeal by the North Eastern Railway Company against a rate made for the relief of the poor in the parish of Dalton, and for other purposes chargeable thereon.

1. Prior to the making of an order by the quarter sessions for the North Riding of Yorkshire, at Michaelmas 1880, constituting the hamlet of Islebeck a separate highway parish, and annexing that parish to the Birdforth highway district, the hamlet formed part of the township of Bagby, and was a place in which all the highways were repairable by the occupiers of lands ratione tenuræ, and in which no highway rates were leviable by reason of the exemption contained in s. 33 of the Highway Act, 1835. (1) The hamlet continued to form part of the township of Bagby until June 1, 1886, as hereinafter mentioned.

2. The North Eastern Railway was prior to the making of the said order, and has since been, and still is, in occupation of lands in the hamlet, and was, prior to the making of the order next hereinafter referred to, liable ratione tenuræ to repair 84 yards of a certain highway in the hamlet.

3. On April 11, 1881, an order was made, notwithstanding the opposition of the North Eastern Railway Company, by justices at a petty sessions for the division of Birdforth, under s. 35 of the Highway Act, 1862 (2), whereby it was ordered that all the highways within the hamlet of Islebeck should

(1) 5 & 6 Will. 4, c. 50. By s. 33, "When property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed."

(2) 25 & 26 Vict. c. 61. By s. 35, "Where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway as aforesaid, to appear before two or more justices in petty sessions assembled, and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway."

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become, and for ever thereafter be, parish highways, and be repaired and maintained by the Birdforth Highway Board, and whereby the sums to be paid by the respective occupiers of lands within the hamlet previously liable to the repair of the highways, in full discharge of all claims thereafter in respect of the repair and maintenance of the highways, were fixed. Such sums were duly paid in accordance with the order.

4. On August 22, 1881, the railway company was rated and assessed, in respect of its lands, to a rate for the expenses incurred by the Birdforth Highway Board in repairing and maintaining the highways within its district, including the highways within the hamlet of Islebeck, and for other expenses legally incurred by the board. This rate was appealed against by the company to the quarter sessions at Michaelmas, 1881, upon the ground that the company was exempt from liability to contribute towards the repair and maintenance of the highways, and upon proof of the foregoing facts the appeal against the rate was allowed.

5. By an order of the Local Government Board, dated June 1, 1886, and confirmed by the Local Government Board's Provisional Orders Confirmation (Poor Law) Act, 1887 (1), the hamlet of Islebeck was detached from the township of Bagby, and was amalgamated with the township of Dalton in the Birdforth highway district.

6. On June 7, 1897, a rate for the relief of the poor in the parish of Dalton, and for other purposes chargeable thereon, was made, in which the railway company was rated and assessed in respect of its occupation of its lands in the hamlet of Islebeck. This rate was levied (inter alia) in respect of expenses incurred, or to be incurred, by the rural district council of Thirsk, which council was the successor of the Birdforth Highway Board, in respect of the repair and maintenance of the highways within the rural district, including the portion of the parish of Dalton which was, or is, comprised in the hamlet of Islebeck.

7. The railway company entered an appeal against the rate

(1) 50 & 51 Vict. c. lviii.

at the Midsummer quarter sessions, which appeal was respited till the following quarter sessions, when it was heard.

8. The appellants admitted that, subject to the matters contained in paragraph 9, the rate had been duly laid, and demand therefor had been made.

9. On behalf of the company it was contended—

(*a*) That, it having been decided in the appeal to the quarter sessions at Michaelmas, 1881, that the company was not liable to contribute towards the repair and maintenance of the highways in that portion of the parish of Dalton which was formerly the hamlet of Islebeck, the question was res judicata, and the quarter sessions was precluded from deciding otherwise in the present appeal;

(*b*) That the company, having been liable to repair the highways in the hamlet of Islebeck ratione tenuræ, was exempted by s. 33 of the Highway Act, 1835, from liability to rates levied in respect of the repair and maintenance of those highways, and had continued to be exempt ever since; and

(*c*) That the company, having complied with the requirements of the order of petty sessions referred to in paragraph 3, was, by virtue of s. 35 of the Highway Act, 1862, discharged of all claims thereafter in respect of the repair and maintenance of the highways in the hamlet of Islebeck, and was therefore not liable to pay the rate.

10. On behalf of the respondents it was contended—

(*a*) That the decision of the quarter sessions at Michaelmas, 1881, was final only for its proper purpose and object, which purpose and object was that the railway company was not liable to pay a rate of 5½*d.* in the pound, laid on August 21, 1881, for the purpose of raising moneys payable under a precept of the Birdford Highway Board, and that the decision was not conclusive evidence of the matters set out in paragraph 9 (*b*) and (*c*), which matters only came collaterally (if at all) in question before the sessions, or were only incidentally cognizable, or were at most only matters to be inferred by argument from the decision;

(*b*) That the exemption from the payment of highway rates conferred by s. 33 of the Highway Act, 1835, continued only so

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long as the liability of the company to repair the 84 yards of the highway ratione tenuræ lasted, and that therefore the exemption determined on April 11, 1881, when by virtue of the order of the justices the said portion of the highway became a parish highway;

(c) That the order dated April 11, 1881, only operated to discharge the company from all claims from that date by the Birdforth Highway Board or its successors in respect of the repairs and maintenance of the 84 yards of the highway then ordered to be made repairable by the parish, and in no way affected the liability of the company in respect of its occupation of property within the district of the Thirsk Rural District Council, and otherwise by law liable to be rated, from paying rates for expenses incurred by the council of the Thirsk rural district in respect of the repair and maintenance of the highways within the rural district.

11. The court of quarter sessions were of opinion that the question was not res judicata, and that they were not bound by the decision in the appeal to the quarter sessions in 1881, and that the railway company was not exempt from payment of any portion of the rate. They accordingly dismissed the appeal.

12. The questions for the opinion of the Court were:—

(1.) Were the quarter sessions precluded, by their previous decision of Michaelmas, 1881, from holding that the railway company was liable to be rated, in respect of its occupation of lands within the hamlet of Islebeck, for expenses incurred by the rural district council of Thirsk in relation to the highways within that rural district?

(2.) Was the railway company exempt from payment of so much of the rates as was levied in respect of the repair and maintenance of the highways in the hamlet?

A. A. Bethune (*R. Cunningham Glen* with him), for the appellants. The appellants, the North Eastern Railway Company, are exempted from liability to the rate in question by s. 35 of the Highway Act, 1862, and the liability ratione tenuræ, to which they were formerly subject, having been put an end to

by the order made under that section, there is nothing in the facts stated in the case which can have the effect of reviving it: *Reg.* v. *Heath.* (1) The later decision with respect to the same highway—*Heath* v. *Weaverham Overseers* (2)—is distinguishable, because in that case the highway, which had been a turnpike road, had ceased to be a turnpike road. Further, in the present case, it having been decided by the order of quarter sessions at Michaelmas, 1881, that the appellants were not liable to be rated, that decision is conclusive, and operates as an estoppel, so that the respondents cannot now contend that the appellants are liable: *Duchess of Kingston's Case* (3); *Rex* v. *Wick St. Lawrence, Inhabitants* (4); *Reg.* v. *Clint, Inhabitants* (5); *Reg.* v. *Haughton, Inhabitants* (6); *Wildes* v. *Russell* (7); *Reg.* v. *Hutchings.* (8)

Macmorran, Q.C. (*H. Gawan Taylor* with him), for the respondents. The exemption from the payment of highway rates conferred by s. 33 of the Highway Act, 1835, continued only so long as the liability of the company to repair the 84 yards of the highway ratione tenuræ lasted, and therefore the exemption was determined on April 11, 1881, when by the order of the justices that portion of the highway became a parish highway. As to the question of estoppel, the judgments of Charles and Collins JJ. in *Heath* v. *Weaverham Overseers* (2), and the judgment of Lord Selborne L.C. in *Reg.* v. *Hutchings* (8), are conclusive against the appellants' contention.

A. A. Bethune, replied.

WILLS J. This case raises two questions, the first, as to the construction of s. 35 of the Highway Act, 1862 (25 & 26 Vict. c. 61), and the second, as to whether the previous order of the quarter sessions operates as an estoppel.

By s. 35 of the Highway Act, 1862, "Where any person or corporation is liable, by reason of tenure of lands or otherwise, to repair any highway situate in a highway district, the person

(1) (1866) L. R. 1 Q. B. 218.
(2) [1894] 2 Q. B. 108.
(3) (1776) 2 Sm. L. C. 10th ed. p. 713.
(4) (1833) 5 B. & Ad. 526.
(5) (1841) 11 A. & E. 624.
(6) (1853) 1 E. & B. 501.
(7) (1866) L. R. 1 C. P. 722.
(8) (1881) 6 Q. B. D. 300.

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or corporation so liable may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate"; and summonses shall issue for the waywarden, the surveyor, and the party liable, to appear at petty sessions; "and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the highway board of the district, in full discharge of all claims thereafter in respect of the repair and maintenance of such highway." The question raised on this section is, whether the order of the petty sessions discharges the person liable altogether from all future liability in respect of the expense of repairing the highway, or, whether its operation is confined to the extra cost, which would fall upon him, as compared with the other ratepayers, in consequence of his liability to repair ratione tenuræ. The language of the section is somewhat crabbed, and not very easy to understand, but on the whole I think the governing words are, "such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish." It would have been easy to provide that the land in respect of which the liability to repair had existed should always continue exempt from highway rates; but that is not stated expressly, and the consequences of adopting such a construction might be startling. It happens that in this particular place there were no highways which were not repairable ratione tenuræ; the same thing might happen in a whole district, and it would follow that a sum would be fixed for all time, which could never be increased, although the expenses of repair and maintenance had increased to double or treble the amount at which they stood when the sum was originally fixed, and so the sum fixed might become utterly inadequate to meet the expenses. Take the case of a man who is liable to repair a country lane ratione tenuræ; a sum might be fixed under s. 35, which would probably be very moderate, and afterwards the traffic might increase to such an

extent that if he had remained liable to repair ratione tenuræ he would have incurred a greatly increased liability, but if his liability were commuted for a sum fixed once for all, the whole of the increased expenditure would fall upon the other members of the community. It is contended that the opposite construction might in certain cases operate harshly; but such cases would be rare, and in the working of a general Act there must often be some cases of individual hardship. The Legislature has enacted that the highway shall be repairable by the parish; that means that it shall become liable to be repaired by the contributions of every one in the parish, including the individual who was formerly liable ratione tenuræ. If this view is adopted, no injustice can be done that I can see; on the contrary, it seems to me that this is a reasonable construction, for the practical inconvenience of a different construction might be extreme. Under the Highway Act, 1862, practically the same scheme is preserved as was carried out by the Highway Act, 1835 (5 & 6 Will. 4, c. 50).

The second question is, whether there is any estoppel. That is often a question of some difficulty, not so much in ascertaining the principle as in applying the principle to the facts of the particular case. The principle of the law of estoppel by judgment is explained by Lord Selborne L.C. in *Reg.* v. *Hutchings* (1), adopting the opinion of De Grey C.J. in the *Duchess of Kingston's Case.* (2) Lord Selborne states it thus: "'The judgment' (said De Grey C.J.) 'of a court of concurrent' (or of exclusive) 'jurisdiction, directly upon the point, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence' (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.'" (3) In the present case the judgment of the court of

(1) 6 Q. B. D. 300. (2) 2 Sm. L. C. 10th ed. p. 713.
(3) 6 Q. B. D. at p. 304.

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quarter sessions was, that that particular rate be quashed; it therefore follows that the rate in question was a bad rate, and, as between the same parties, the decision of the quarter sessions to that effect would be binding; but the construction of the statute was only a matter incidentally cognizable. The decision in *Reg.* v. *Hutchings* (1) comes very near to the present case on this second question. Mr. Bethune for the appellants argued that there is a difference between a judgment of quarter sessions and a summary order made by magistrates. For some purposes, and in some cases, there may be a difference; but *Reg.* v. *Hutchings* (1) was not decided on that distinction. There is nothing in the judgment of the Court of Appeal in that case inconsistent with the proposition that an order of a court of summary jurisdiction, as between the same parties, would operate as an estoppel, if the proper elements of an estoppel were present.

For these reasons, I am of opinion that our judgment ought to be for the respondents.

KENNEDY J. I agree, and on the same grounds.

Judgment for the respondents; leave to appeal granted.

Solicitor for appellants: *A. Kaye Butterworth.*
Solicitor for respondents: *Swarbreck, Thirsk.*

(1) 6 Q. B. D. 300.

P. B. H.

THE LONDON COUNTY COUNCIL *v.* EDWARDS.

1898
May 19.

London County—Nuisances and Sanitation—Non-removal of Milk—"Building"—Dairies, Cowsheds, and Milk Shops Order, 1885.

No. 29 of the Regulations of the London County Council as to Dairies, Cowsheds, and Milk Shops provides that every purveyor of milk shall, on any outbreak of infectious disease within the building or upon the premises in which he keeps milk coming to his knowledge, remove all milk for sale from such building until it has been disinfected.

The respondent, a purveyor of milk, was tenant of a three-storied building, each floor of which was adapted for separate occupation, but with a central staircase common to each. He occupied the ground-floor for the purpose of his business, sub-let the first floor, and occupied the second floor as a residence for himself and his family. One of his children had scarlet fever in a room on the second floor :—

Held, that this was an outbreak of infectious disease within the building in which the respondent kept milk, and, therefore, that the non-removal from the ground-floor of milk for sale there was an infringement by him of the above regulation.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

The respondent was charged, upon an information laid by the appellants, with a breach of No. 29 of the Regulations of the London County Council, made in pursuance of the Dairies, Cowsheds, and Milk Shops Order, 1885. (1)

(1) "Regulations prescribing precautions to be taken by purveyors of milk, and persons selling milk by retail, against infection or contamination."

"28. Every purveyor of milk, or person selling milk by retail, shall immediately on any outbreak of infectious or contagious disease within the building or upon the premises in which he keeps milk, or amongst the persons employed in his business, give notice of such outbreak to the Board at their office in Spring Gardens."

"29. Every purveyor of milk, or person selling milk by retail, shall immediately on such outbreak coming to his knowledge remove all milk for sale and all utensils for containing milk for sale from such building, and shall cease to keep milk for sale or to sell milk in such building, until the same has been disinfected and declared by the medical officer of health for the district to be free from infection."

[The Dairies, Cowsheds, and Milk Shops Order, 1885, was made under the power conferred upon the Privy Council by the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 34 (v.). By the Contagious Diseases (Animals) Act, 1886 (49 & 50 Vict. c. 32), s. 9, that Order is to be deemed to have been made by the

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The following facts were proved or admitted at the hearing.

The respondent carried on the trade or business of a purveyor of milk, and sold milk by retail at 18, Vauxhall Walk. No. 18, Vauxhall Walk, is a three-storied building or block of tenements or flats, each floor of which has its own water-closet, water supply, and sanitary arrangements, so as to be adapted for separate occupation. The shop and rooms on the ground-floor were used by the respondent for the purpose of his business. The first floor was sub-let by the respondent to, and was occupied by, a family named Yapp; and the rooms on the second floor were used by the respondent and his family as bed-rooms and living rooms only. There was one central staircase common to each flat leading from the ground to the second floor, and giving direct access to the different rooms on each of the floors. This staircase communicated directly with the shop. On or about November 27, 1897, there was an outbreak of infectious or contagious disease at 18, Vauxhall Walk, inasmuch as one of the respondent's children was taken ill with scarlet fever. Such outbreak at once came to the knowledge of the respondent. The patient was isolated with all proper and usual precautions in one of the rooms on the second floor; but the respondent continued to sleep in the next room. The respondent had in his shop on the ground-floor milk for sale and utensils containing milk for sale, and did not remove either the utensils or the milk, and continued to keep for sale and sell milk in the shop; and, on December 2, the respondent's child still being ill upstairs, the respondent had in his shop for sale about seven gallons of milk in three utensils. No part of the premises had been disinfected or declared by the medical officer of health for the district to be free from infection; but the respondent's medical attendant and the sanitary inspector

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Local Government Board, and the powers of the Privy Council under the above s. 34 are transferred to the Local Government Board. The power to make orders authorizing the county council to make by-laws for prescribing precautions to be taken for protecting milk against infection or contamination is now vested in the Local Government Board by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 28, sub-s. 1 (*e*), which Act repeals the above sections.]

of the parish of Lambeth expressed themselves satisfied with the steps taken for the isolation of the patient on the top floor.

The magistrate was of opinion that, upon the facts above stated, each floor of No. 18, Vauxhall Walk, was a separate building and separate premises within the meaning of the said 28th and 29th regulations, and that there was, therefore, no outbreak of disease within the building or upon the premises in which the respondent kept milk within the meaning of Regulations 28 and 29; and he dismissed the information.

The question of law for the opinion of the Court was whether, upon the true construction of the 28th and 29th regulations, there was, on the facts above stated, any outbreak of infectious or contagious disease within the building or upon the premises in which the respondent kept milk.

If the Court should be of opinion that the magistrate's decision was right, the information to stand dismissed; if of the contrary opinion, the case to be remitted to the magistrate.

Daldy, for the appellants, after reading the case, was stopped.

Rowsell, for the respondent. The "building" or "premises" referred to in these two regulations mean the place where the business of a dairy or milk-shop is carried on. It cannot have been intended that, if there is an outbreak of infectious disease in one of a number of flats separately occupied, a purveyor of milk who carries on his business in another flat, which is altogether separate except for a central staircase in common, is liable to be convicted if he does not give notice of the outbreak, or does not remove his milk. The same meaning must be given to "building" in both regulations; and No. 28, as to giving notice, requires that it should be done as soon as the outbreak occurs, not when it comes to his knowledge. Each of these flats are as much separate buildings as if they were beside, instead of being over, one another; and the common staircase no more makes them one building than a passage common to two adjoining houses makes them one building. This is mainly a question of fact, and the magistrate has found that in this case the milk was not in the same building as that in which there was an outbreak of disease.

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WILLS J. I am sorry that I am unable to agree with the decision of the learned magistrate in this case. I think that we are bound to hold that the room in which this outbreak of infectious disease occurred was within the building in which the respondent kept milk, both in order to give effect to the plain meaning of the word "building," and because all the mischief of the statute is satisfied where the milk is kept in a room under the same roof as, and communicating by a staircase with, the place in which the outbreak occurs. It has been pointed out by the learned counsel for the respondent that No. 28 of these regulations apparently makes it an offence for a purveyor of milk not to give notice immediately on an outbreak of infectious disease occurring within the building in which he keeps milk; and it was argued that, if "the building" was to be held to include a different floor separately occupied, he might have no knowledge of the outbreak, and yet would be liable for not giving notice. That seems to be another notable instance of defective drafting. I can hardly believe, however, that any Court would hold a man liable for not giving notice of an outbreak of which, without any fault of his own, he had no knowledge. But that question is quite immaterial in the present case. It is not No. 28 of these regulations which the respondent is charged with having broken, but No. 29, which is only to take effect "on such outbreak coming to his knowledge." It appears to me to be impossible in this case to give a different meaning to the words "within the building" to that which they would ordinarily bear.

KENNEDY J. I am of the same opinion. With the greatest respect for the learned magistrate, I find it impossible to give the meaning that he has done to the word "building."

Judgment for the appellants.
Case remitted to the magistrate.

Solicitor for appellants: *W. A. Blaxland.*
Solicitor for respondent: *W. H. Armstrong.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1898
May 26.

Ex parte ELLIS.

Bill of Sale—Default in Payment of Interest—Seizure of Goods—Relief—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

Under a bill of sale the principal sum thereby secured was payable at the end of two years, and in the meantime a certain sum was payable monthly as interest. One of the monthly payments of interest being in arrear, the grantee of the bill of sale took possession of the goods thereby assigned for the purpose of holding the same until payment of the interest due, but not for the purpose of realizing the security by sale of the goods:—

Held, that, under the above-mentioned circumstances, an order could not be made under s. 7 of the Bills of Sale Act, 1882, that upon payment of the principal, interest up to date, and costs the grantee of the bill of sale should give up his security.

Ex parte Wickens, [1898] 1 Q. B. 543, distinguished.

APPEAL from an order of Darling J. at chambers directing the grantee of a bill of sale to withdraw from possession of the goods and give up the bill of sale as after mentioned.

The bill of sale was given by Ellis to one Shuckburgh, who carried on business as the Clerical and Medical Advance Bank, upon October 8, 1897, to secure repayment of an advance of 30*l.* with interest thereon at the rate of 60*l.* per cent. per annum, and the grantor covenanted to pay to the grantee the principal sum and interest as follows: 1*l.* 10*s.* on November 8, 1897, and 1*l.* 10*s.* on the 8th of each succeeding month until October 8, 1899, when he would pay the sum of 31*l.* 10*s.* The bill of sale contained a proviso that the goods should not be liable to seizure by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882. A month's interest due April 8, 1898, being in arrear, upon April 19 the grantee of the bill of sale caused the goods thereby assigned to be seized under a warrant authorizing the bailiff to take and hold possession of them for the amount of 1*l.* 10*s.* due for interest and levy fee 1*s.* 6*d.* The grantor of the bill of sale then tendered to the grantee the amount of 32*l.* 10*s.* in payment of the principal, interest up to date, and costs, but

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the grantee refused to accept it. The grantor thereupon applied to the judge at chambers for relief under s. 7 of the Bills of Sale Act, 1882. The judge ordered that the grantee should withdraw from possession and give up the bill of sale to the grantor on payment of 32*l.* 10*s.*

Crump, Q.C., and *W. de B. Herbert* (*Lewis Thomas* with them), for the grantee of the bill of sale. The order of the learned judge was wrongly made. He proceeded upon the equitable doctrine applied in *Ex parte Wickens* (1), which entitles a mortgagor to have the security given up on payment of principal, interest up to date, and costs where the mortgagee is proceeding to realize his security. But in the present case the grantee was not proceeding to realize his security. He only authorized the bailiff to take possession of and hold the goods until payment of the interest in arrear, not to sell the goods or any of them.

Herbert Chitty, for the grantor of the bill of sale. It is contended that upon the terms of this bill of sale read together with s. 7 of the Bills of Sale Act, 1882, the grantee can only exercise the power of seizure and sale once for all, in order to realize principal and interest in arrear, upon a default in payment under the bill of sale. He cannot seize and claim to sell merely for one payment of interest in arrear. By seizing he was seeking to enforce his security, and thereupon the equitable doctrine applied in *Ex parte Wickens* (1) comes into play. The order of the learned judge was therefore right. [He cited *Watkins* v. *Evans*. (2)]

A. L. SMITH L.J. This is an appeal from the order of a judge at chambers by which he directed that a bill of sale should be given up to the grantor. The grantor was in arrear with regard to one monthly payment of interest, and there is no doubt that, reading the bill of sale in conjunction with the Bills of Sale Act, 1882, the grantee had power to seize the goods comprised in the bill of sale if default was made in payment of any of the sums thereby secured. In order to maintain his

(1) [1898] 1 Q. B. 543. (2) (1887) 18 Q. B. D. 386.

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security and enforce payment of the interest in arrear, the grantee took possession of the goods. He did not take possession for the purpose of realizing his security by the sale of all or any of the goods seized. Under these circumstances the question arises whether the judge was right in ordering the bill of sale to be given up as he did. Undoubtedly he had jurisdiction to order the grantee to withdraw from possession of the goods upon payment of the amount of interest in arrear and the costs of the seizure, but in that case the bill of sale would continue in existence and further interest would become due under it. The judge did not merely make that order, but ordered that the bill of sale should be given up and vacated on payment of the principal, interest due up to date, and costs. I do not think he had jurisdiction to make such an order. *Ex parte Wickens* (1) is no authority as to the present case. It was there held that, where the holder of a bill of sale took possession of the goods, not for the purpose of maintaining his security, but for the purpose of realizing it by the sale of the goods, the rule of equity applicable to the case of a mortgagee seeking to realize his security applied, and the judge had jurisdiction to order that the security should be given up on payment of the principal with interest up to date and costs. The present case is not within that decision. I do not think that an order can be made that the bill of sale shall be given up where the grantee has seized for the purpose of maintaining and not of realizing his security. It would be a great hardship on him if it were otherwise. He has a contract whereby, in consideration of his lending a sum of money for a certain time, the grantor agrees to pay interest at a certain rate for that period. If the law were as contended for by the grantor the grantee could take no step to maintain his security or enforce payment of interest in arrear without running the risk of being paid off and having the contract to pay interest during the rest of the period vacated. On the other hand, if the grantee seizes the goods for the purpose of realizing the security by sale of them, it is no hardship on him that on payment of the principal, interest up to date, and costs, he should be ordered to give up the

(1) [1898] 1 Q. B. 543.

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security. For these reasons I think the appeal should be allowed.

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VAUGHAN WILLIAMS L.J. I agree. Upon looking at the case of *Ex parte Wickens* (1) for the purpose of seeing what was really there decided, it appears to me that the decision was made to turn upon a question of fact, namely, whether the grantee of the bill of sale had seized for the purpose of realizing his security. The Court found that he had seized for that purpose, and, that being so, the grantor was entitled upon payment of the principal and interest up to date to have the security given up to her. Whether or not the grantor would have that right, if the grantee had only taken possession for the purpose of protecting his security, the Court had not really to decide; but they held that the judge had power to make the order which he did because in fact the grantee had seized for the purpose of realizing his security. Chitty L.J., in dealing with the equitable doctrine applicable to such cases, said: "It may be a question whether, upon a demand for production of the last receipt for rent and upon failure without reasonable excuse to comply with that demand, and an entry into possession in consequence, the grantee may not maintain that he entered for the purpose of protecting his security. But I have no hesitation in saying that the seizure in this case was for the purpose of realizing the security—in other words, for the purpose of enforcing payment. It is clear beyond doubt in equity that, if a mortgagee takes proceedings to enforce his security, the mortgagor can at once tender the principal, interest, and costs, and is absolved from the obligation of giving six months' notice to pay off the mortgage, or of paying six months' interest in lieu of notice." I gather from that passage in his judgment that, according to his view, if the seizure had been for the purpose of merely protecting the security, the equitable doctrine would not have applied, by which the mortgagor is entitled upon the mortgagee's taking steps to realize his security to have the security given up on payment of principal, interest due, and costs. I draw the same inference from the judgments delivered by my brothers A. L. Smith and Collins.

(1) [1898] 1 Q. B. 543.

It being clear that the seizure in the present case was in fact made merely for the purpose of protecting the security, and not for the purpose of realizing it by sale, I think the order of the learned judge ought not to have been made.

Appeal allowed.

Solicitors for appellant: *Ford & Ford, for Cumberland, Bristol.*

Solicitors for respondent: *Pritchard, Englefield & Co., for J. P. Court, Liverpool.*

E. L.

RUNDLE *v.* HEARLE.

1898 *April* 1, 5; *May* 23.

Highway—Footpath—Evidence of Liability to Repair Ratione Tenuræ—Remedy against a Person so Liable to Repair.

The defendant was the occupier of two adjoining fields through which ran a public footpath crossing the fence between the two fields by means of a stile. The defendant and his predecessors in occupation had occasionally done slight repairs to the footpath and the stile; but there was no evidence that he or they had ever been required by the highway authority to do so. The plaintiff, who was using the footpath as a member of the public, fell in getting over the stile in consequence of the stile being out of repair, and was injured. He sued the defendant, charging that he was liable to repair ratione tenuræ:—

Held, that the fact of the repairs done by the defendant and his predecessors, being consistent with such repairs having been done by them for their own benefit, was no evidence of any liability to repair ratione tenuræ.

Quære, whether an action will lie against a person liable to repair a public way ratione tenuræ for special damage suffered by a member of the public in consequence of the way being out of repair.

APPEAL from the county court of Cornwall.

The defendant was the occupier of a farm through which ran a public footpath, which crossed a fence separating two of the defendant's fields by means of a stone stile. Owing to the stones of the stile being worn away the plaintiff, who was using the footpath as a member of the public, fell in attempting to get over the stile and was injured. The plaintiff brought an action for damages against the defendant, alleging that he was liable to repair the path and stile ratione tenuræ. The defendant had

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been in occupation of the farm for thirty years. About twenty years before the plaintiff's accident a servant of the defendant had repaired the path and put a new stone step in the stile. The defendant's predecessor in the occupation of the farm was a Mr. Martin, who was also the owner; and there was evidence that he used to repair the path on both sides of the stile. Martin's predecessor was a man named Hockling, who had occupied the farm for thirty or forty years. He used to repair both the pathway and the stile. It was objected before the county court judge that these facts afforded no evidence of any liability in the defendant to repair ratione tenuræ; and it was also contended that even if the defendant was so liable, no action would lie against him for a non-feasance. The county court judge overruled both objections, and gave judgment for the plaintiff. The defendant appealed.

Kerly (*Duke* with him), for the defendant. First, the facts proved afford no evidence of any liability on the defendant to repair. It is reasonable to infer that the repairs were done, not in the discharge of any duty, but for the occupier's own benefit and the more convenient enjoyment of his farm: *Rex* v. *Allanson*. (1) It is conceded that if any one is liable to repair ratione tenuræ it is the occupier and not the owner. Secondly, if the defendant is liable to repair, no action will lie against him for the omission; the only remedy is indictment. No action lay at common law against a parish for damage caused by non-repair of the highways: *Russell* v. *Men of Devon*. (2) Nor does any action lie for non-repair against a surveyor of highways appointed under the Highway Act of William IV.: *Young* v. *Davis* (3); nor, in the absence of express statutory provision to that effect, will such action lie against any of the various public bodies to whom the duties of surveyor of highways, and the duties and liabilities vested by the Highway Act in the inhabitants of the parish in vestry assembled, have been transferred by statute: *Cowley* v. *Newmarket Local Board*. (4)

(1) (1828) 1 Lew. C. C. 158.
(2) (1788) 2 T. R. 667.
(3) (1862) 7 H. & N. 760; (1863) 2 H. & C. 197.
(4) [1892] A. C. 345.

The case of *Borough of Bathurst* v. *Macpherson* (1), which seemed to suggest the contrary, has since been explained in *Municipality of Pictou* v. *Geldert* (2), to have proceeded on the ground that the breach of duty there complained of was a misfeasance and not merely a non-feasance. But if no action for non-feasance will lie against such public bodies, neither will it lie against an individual, for the liability of an individual to repair ratione tenuræ is only that which has been transferred from the parish.

Fraser Macleod, for the plaintiff. The fact that an occupier of land and his predecessors have from time immemorial repaired a way is conclusive of their liability to repair it ratione tenuræ. "If a bishop or prior, &c., hath at once or twice of alms repaired a bridge it bindeth not (and yet is evidence against him until he prove the contrary), but if time out of mind they and their predecessors have repaired it of alms this shall bind them to it": Coke, 2 Inst. p. 700. And the fact that the defendant and his predecessors have repaired the way for upwards of seventy years is very strong evidence that they have repaired it from time immemorial. Secondly, as to the proposition that no action will lie for non-repair, the cases cited are not in point, for they only shew that a public body cannot be so sued. The reasons why such an action will not lie against a public body have no application to the case of an individual. In *Russell* v. *Men of Devon* (3) Lord Kenyon treats the proposition "that an action would lie by an individual for an injury which he has sustained against any other individual who is bound to repair" a public way as one which "cannot be controverted." He there expressly draws a distinction between a public body and an individual. In *Mayor, &c., of Lyme Regis* v. *Henley* (4) it was conceded by Sir James Scarlett, as counsel for the plaintiffs in error, that an action would lie for non-repair against corporations or individuals who were liable to repair by virtue of the tenure of their land; the only contention there was that a stranger could not sue for a breach of an obligation to repair created by a Crown grant made since the time of legal memory.

(1) (1879) 4 App. Cas. 256.
(2) [1893] A. C. 524.
(3) 2 T. R. 667.
(4) (1832) 3 B. & Ad. 77.

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That contention the Court overruled, on the ground that "the obligation is one which concerns the public, in consequence of which an indictment might have been maintained against the plaintiffs in error for their general default; from whence it follows that an action on the case will lie against them for a direct and particular damage sustained by an individual, as in the ordinary case of nuisance in a highway by a stranger digging a trench, &c., or by the act or *default* of a person bound to repair ratione tenuræ." And that passage is cited with approval by Pollock C.B. in *M'Kinnon* v. *Penson*. (1) There is no analogy between a public body, to whom the liability of the surveyor of highways or of the parish in vestry assembled has been transferred by statute, and an individual liable to repair ratione tenuræ. The liability of the latter is not one which originally lay upon the parish and has been transferred to him, but is presumably coeval with the highway itself. It owed its origin, as the term "ratione tenuræ" implies, to a condition attached to a grant of land made before the time of legal memory.

Kerly, in reply. If an action for non-repair will lie against an individual, it is strange that no instance of such an action can be found in the books. The only authorities on which the plaintiff relies are two dicta: one by Lord Kenyon in *Russell* v. *Men of Devon* (2), and the other by Lord Tenterden in *Mayor, &c., of Lyme Regis* v. *Henley* (3); and the authority of the latter dictum is seriously diminished by the fact that the reasoning by which the Court arrived at it, that wherever an indictment will lie an action will lie for special damage, is now well established to be bad law. On the other hand, there is a dictum in Brooke's Abridgment, tit. "Action sur le Case," 93, that if a public way be out of repair so that I mire my horse, I shall not have an action against him who ought to repair it ("vers cestuy que doit repairer ceo"), for the cause of complaint is one which is common to the whole public, and ought to be remedied by presentment ("car est popul' et serra reforme per presentment"). The words "cestuy que doit" are in the

(1) (1853) 8 Ex. 319.

(2) 2 T. R. 667.

(3) 3 B. & Ad. 77.

singular, and must refer to a person liable to repair ratione tenuræ. It is to be observed that the words "car est popul'" seem to have been mistranslated by Mr. Chambre, in his argument in *Russell* v. *Men of Devon* (1), to mean that "as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect": a mistranslation which has since been reproduced in, and indeed seems to have formed the basis of the reasoning of, more than one important judgment. Mr. Chambre read the abbreviation "popul'" as "populus." On reference to the Year Book 5 Edw. 4, Easter Term, pl. 24, which is cited by Brooke as his authority, it will be seen that the language of the placitum is "mes ceo est action populer, en quel case nul home singuler avera action de case, mes ceo est action per voy de presentment," shewing that the words "car est popul'" in Brooke refer to the complainants, not to the persons liable to repair. In the reign of Edward IV. the doctrine that a member of the public who suffers special damage as the result of a nuisance to a highway may bring a civil action for it had probably not yet come into existence. The objection which existed at that day to the maintenance of an action for non-repair of a highway was probably nothing more than the objection to a multiplicity of actions—an objection which applied equally whether the defendants were a parish or an individual, whether the nuisance complained of was a non-feasance or a mis-feasance, and whether the plaintiff had suffered any special damage or had not.

Cur. adv. vult.

The judgment of the Court (Lord Russell of Killowen C.J. and Ridley J.) was read by

LORD RUSSELL of KILLOWEN C.J. The plaintiff sued the defendant under these circumstances. The defendant is the yearly tenant of a farm through which is a public pathway. At one point in its course is a stone stile with stone steps, some of which have been worn away by time and user. In crossing it the plaintiff slipped from one of these steps, fell, and broke

(1) 2 T. R. 667.

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his leg. He thereupon sued the defendant for damages, alleging that he was liable ratione tenuræ to repair the stile, and that he had suffered by its want of repair. The county court judge took this view, and awarded him damages.

If it were necessary to consider and determine the point whether an action will lie at the instance of a private person against one liable to repair ratione tenuræ, we should desire to hear further argument upon it. There is, so far as we are aware, no record of any such case in the books, although the circumstances giving rise to such an action must have been of frequent occurrence. In the case of *Young* v. *Davis* (1) Martin B. expressed considerable doubt upon the point. He there says: "I should have been surprised if any case had been found in which it was determined that an action for non-repair was maintainable against a person bound to repair ratione tenuræ. The case in the Year Book, 11 Hen. 4, 82, 83, which was supposed to be an authority for that position, on being examined will be found not to be so. That was an action by a lord of a manor who relied on a prescription that he and all whose estate he had in the manor had a right to have a bridge kept in repair by the owner of a mill. That is totally different from an obligation towards all the Queen's subjects passing along a highway." We do not, however, decide this case on the view taken by that learned judge, for we are of opinion that there was in this case no sufficient evidence to warrant the county court judge in coming to the conclusion that the defendant was under the obligation to repair ratione tenuræ.

There was the usual conflict as to the past and existing state of the stile, and what had been done to it in the way of repairs. One of the plaintiff's witnesses stated that the stile was at the time of the accident in the same state as it was in forty years ago, and the defendant and his witnesses denied that the defendant had in fact repaired the stile. We must, however, assume that the county court judge gave effect to the other evidence on the part of the plaintiff, and proceed to examine it. There was no evidence that the parish had ever repaired, or

(1) 7 H & N. 760, at p. 773.

had ever required the defendant or any prior occupier to repair; but there was evidence that the defendant's predecessor in possession, who was, however, also proved to be the owner, had done repairs to the path and stile. Another witness stated that previous occupiers had repaired; and finally a man formerly in the defendant's employment stated that he had done some repairs. In no case do the repairs seem to have been considerable.

The fact that a person has done repairs to a way may certainly be some evidence of such liability. For instance, in *Reg.* v. *Blakemore* (1), where the defendant was so held liable, the evidence was that his predecessor had been convicted of not repairing the high road in question in the year 1801, and had subsequently done repairs to it; and in *Reg.* v. *Barker* (2) the defendant and his predecessors had repaired the high road, for the non-repair of which he was indicted, from time immemorial, and on that evidence he was found liable. But in each of those cases the road was a road for carriages and horses, which is a widely different thing from a footpath through fields and over stiles. The one requires repairs on a system, and at certain intervals, from the nature of the user, while the other does not, and, on the contrary, may never, except on isolated occasions, receive any repairs at all. Such a path may be dedicated subject to the right of ploughing (*Mercer* v. *Woodgate* (3)), although the plough would for the time destroy all traces of the path; and after the plough has passed the path is in common experience trodden out afresh by the passers-by, not made by repair or of hard material, for that would be inconsistent with the passage of the plough at the next season. So it may be that in dedicating to the public such a pathway through his fields the owner may do so without any obligation to repair resting on himself or on anybody. It is a path on which people may pass if they choose to do so, but they must pass along it as they find it, and must take it (to use the words of Cockburn C.J. in the case just quoted) subject to any condition which the owner imposes. Blackburn J., in the same

(1) (1852) 2 Den. C. C. 410. (2) (1890) 25 Q. B. D. 213.
(3) (1869) L. R. 5 Q. B. 26.

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case said: "If this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to stop up the pathway altogether, and so prevent the parish from repairing the path in such a way as to interfere with his ploughing." As the user for which the path is dedicated does not necessitate repairs, we see no objection in law to a dedication of the path without placing on any one the obligation to do them.

In the present instance the evidence on which the county court judge has acted is very slight, considering that the path is an immemorial one, and is quite consistent with such small repairs as were done having been done by the occupier for his own benefit. They were done on his own land. It is not as if they had been done outside his own land, or as if he had done the repairs under threat of legal proceedings, or had admitted that in doing them he was discharging a legal obligation.

We think that the case is like *Hudson* v. *Tabor*. (1) There an action was brought for not maintaining a sea wall on the defendant's land, where it adjoined that of the plaintiff, whereby the plaintiff's land became flooded. And it was shewn, in order to prove the liability of the defendant, that he and his predecessors had from time immemorial repaired the wall where his land fronted the sea. The jury found for the plaintiff; but the Queen's Bench Division and the Court of Appeal held that there was no evidence of liability, and Lord Coleridge in giving judgment said: "The mere repair of a man's own fence for his own benefit, however often done, and during however long a period of time, will not per se, although a man's neighbour may in fact benefit by such repair, impose on a man the duty of continuing such repair for his neighbour's benefit, when he ceases to care to do so for his own." So here the acts relied upon were at the least ambiguous, and we think constitute no sufficient evidence of liability. In the words of Hullock B. in *Rex* v. *Allanson* (2): "An adjoining occupier occasionally doing repairs for his own convenience to go and come, is no more like that sort of repair which makes a man liable ratione tenuræ

(1) (1877) 2 Q. B. D. 290.

(2) 1 Lew. C. C. 158.

than the repair by an individual of a road close to his door is to the repair of the road outside his gate." We therefore think the defendant entitled to judgment. The appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *Rowcliffes & Rawle, for Terrill, Penryn.*

Solicitor for defendant: *H. Dobell, for R. Dobell, Truro.*

J. F. C.

[DIVISIONAL COURT.]

1898

April 4; *May* 14.

KRUSE, APPELLANT; JOHNSON, RESPONDENT.

Local Government—County Council—By-law—Reasonableness—Playing Music or Singing after request to Desist.

In determining the validity of by-laws made by public representative bodies, such as county councils, the Court ought to be slow to hold that a by-law is void for unreasonableness. A by-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

A county council, claiming to act under their statutory powers, made a by-law prohibiting any person from playing music or singing in any public place or highway within fifty yards of any dwelling-house after being requested by any constable, or an inmate of such house, or his or her servant, to desist:—

Held, by Lord Russell of Killowen C.J., Sir F. H. Jeune, Pres. of P. D. and A. Div., Chitty L.J., Wright, Darling, and Channell JJ.—Mathew J. dissenting—that the by-law was valid.

Semble: In cases where there is no appeal from the Divisional Courts, a specially constituted Divisional Court appointed by the Chief Justice of England has power to review, and if it thinks fit to differ from, previous decisions of Divisional Courts on the same subject.

CASE stated by five justices of the county of Kent, under the Summary Jurisdiction Acts.

At a court of summary jurisdiction held in and for the division of Bearsted in the same county the respondent, a superintendent of police, preferred an information against the appellant for that he, on the day therein specified, did sing in a

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certain highway, within fifty yards of a dwelling-house there, after being required by a constable to desist, contrary to a by-law in that behalf made by the county council of Kent.

The by-law in question was made by the county council under s. 16 of the Local Government Act, 1888 (1), and was as follows:—

"4. Playing musical instruments, &c.

"No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally, or by his or her servant, to desist."

At the hearing of the information it was proved to the satisfaction of the justices that the appellant, who was conducting an open-air religious service, did on the day in question, together with others, in the parish of Leeds in the county of Kent, begin to sing a hymn within fifty yards of a dwelling-house, and continued so to sing after he had been requested by a constable to desist. It was further proved by the occupier of the dwelling-house that such singing was an annoyance to him; but it was not proved that on the day in question he had requested the constable to ask the appellant to desist. The occupier had, however, complained to the police on previous occasions.

It was contended on behalf of the appellant that the by-law was invalid.

(1) The Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16: "(1.) A county council shall have the same power of making by-laws in relation to their county, or to any specified part or parts thereof, as the council of a borough have of making by-laws in relation to their borough under s. 23 of the Municipal Corporations Act, 1882. . . . .

"(2.) Provided that by-laws made under the powers of this section shall not be of any force or effect within any borough."

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, sub-s. 1, provides:

"The council may, from time to time, make such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough, and may thereby appoint such fines, not exceeding in any case five pounds, as they deem necessary for the prevention and suppression of offences against the same."

The justices were of opinion that the by-law was valid, and convicted the appellant, imposing a penalty upon him.

The question for the opinion of the Court was whether the by-law was valid or otherwise.

If the Court should be of opinion that it was valid, the conviction to be affirmed; if of the contrary opinion, the conviction to be quashed.

Upon the case coming before a Divisional Court (Lord Russell of Killowen C.J. and Mathew J.) the learned judges differed, and Lord Russell of Killowen C.J. thereupon called together this specially constituted Court to rehear it.

Robson, Q.C. (*G. F. Hohler* with him), for the appellant. The by-law is bad because unreasonable, and the justices ought not to have convicted. It makes acts which, primâ facie, are innocent, criminal offences, though the doing of them does not cause a nuisance or annoyance to any one. Under it an inhabitant may object to and stop the singing of a hymn, not because he really objects to the hymn or to the singing, but because he objects to the propaganda of the singer. Further, power is given to any constable to stop music or singing at his own absolute discretion, although no complaint has been made by any inhabitant. Such a power is likely to be abused; constables are not to be trusted to refrain from an unnecessary exercise of it, and the justices in dealing with a complaint that a person had not stopped singing or playing when ordered by a constable so to do, would probably convict because the commission of an offence against the by-laws had been proved. This Court has always exercised jurisdiction to quash by-laws which are held to be unreasonable, and there is nothing in the Public Health Act, 1875 (38 & 39 Vict. c. 55), or in the Municipal Corporations Act, 1882, which excludes that jurisdiction. Sect. 182 of the Public Health Act, 1875, provides that no by-law made under that Act by a local authority "shall be of any effect if repugnant to the laws of England or to the provisions of this Act." A by-law such as this is repugnant to the common law of England, because it gives power to interfere with the liberty of the subject arbitrarily and capriciously. The power to make by-laws given

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by s. 23 of the Municipal Corporations Act, 1882, or by other statutes, is, it is submitted, limited to acts which are, or in their nature are likely to be, a nuisance or annoyance to others. There must, at the least, be an annoyance. The principles contended for have been affirmed by many decisions of this Court: *Everett* v. *Grapes* (1); *Johnson* v. *Mayor, &c., of Croydon* (2); *Munro* v. *Watson* (3); *Strickland* v. *Hayes* (4); *Alty* v. *Farrell.* (5) In *Burnett* v. *Berry* (6), a by-law prohibiting, under a penalty, any person from frequenting or using any street or other public place within the borough for the purpose of bookmaking or betting was held good. That decision is not against the principle contended for. The business of bookmaking or betting in a particular way has been prohibited by various statutes, and it may be conceded that by-laws may be made against many acts which in their nature are, primâ facie, against good rule and government, and likely to cause a nuisance or annoyance. So, in *Mantle* v. *Jordan* (7), a by-law prohibiting persons from making use of violent, abusive, profane, indecent, or obscene language, &c., "to the annoyance of any person" was held good. It is submitted that this Court cannot overrule those previous decisions of the Divisional Courts which are in point in the appellant's favour.

Dickens, Q.C. (*A. E. Gill* with him), for the respondent. This specially constituted Divisional Court is competent to overrule previous decisions of Divisional Courts with which it does not agree. That was done in *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* (8) The by-law in question is one which could properly be made by the county council under the authority given to them by s. 16 of the Local Government Act, 1888, and s. 23 of the Municipal Corporations Act, 1882. The real question is, What is test of reasonableness which ought to be applied? The Court cannot say that a by-law is unreasonable merely because they do not approve of it. Unless it can be seen that the by-law is manifestly unjust, capricious, inequit-

(1) (1861) 3 L. T. (N.S.) 669.
(2) (1886) 16 Q. B. D. 708.
(3) (1887) 51 J. P. 660.
(4) [1896] 1 Q. B. 290.
(5) [1896] 1 Q. B. 636.
(6) [1896] 1 Q. B. 641.
(7) [1897] 1 Q. B. 248.
(8) [1891] 2 Q. B. 170.

able, or partial in its operation, the question of reasonableness or unreasonableness is one which must be decided by the representative body entrusted with the power to make by-laws, and knowing the locality in which they are to take effect and the needs and wishes of its inhabitants. That was the test adopted by the Privy Council in *Slattery* v. *Naylor*. (1) The Municipal Corporations Act, 1882, provides (s. 23) adequate safeguards with respect to the making of by-laws; they cannot be made unless two-thirds at least of the whole number of the council are present; they do not come into force until the expiration of forty days after a copy has been duly published in the place affected by them, nor until the expiration of forty days after a copy has been sent to the Secretary of State, and they may be disallowed, in whole or in part, by the Queen with the advice of the Privy Council. The test was recognised by Hawkins J. in *Johnson* v. *Mayor, &c., of Croydon* (2), because he said that the council might frame a by-law prohibiting music of such a character as might be offensive or likely to cause annoyance to the inhabitants. So, in *Wanstead Local Board* v. *Wooster* (3), a by-law prohibiting the keeping of pigs in a town within one hundred feet of a dwelling-house was held good; whilst in *Heap* v. *Burnley Union* (4), a similar by-law applied to a country district was held to be bad. The true principle is stated by Wright J. in *Simmons* v. *Malling Rural Council* (5) thus: "I do not think that a by-law should be held unreasonable on the ground that in a particular case inconvenient consequences might result from its enforcement; it is the public interest as a whole which has to be considered." The objections to the by-law here are not well founded. A constable who acts capriciously or unreasonably can be controlled by his superiors, and if a charge of a frivolous and vexatious character be preferred before the justices they may dismiss it under s. 16 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. 49). The justices were right in convicting the appellant.

Robson, Q.C., replied.

Cur. adv. vult.

(1) (1888) 13 App. Cas. 446.
(2) 16 Q. B. D. 708.
(3) (1873) 37 J. P. 403.
(4) (1884) 12 Q. B. D. 617.
(5) [1897] 2 Q. B. 433, at p. 438.

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May 14. The following written judgments were delivered:—

LORD RUSSELL of KILLOWEN C.J. The county council of Kent, claiming to act under their statutory powers, made the following by-law. [His Lordship read the by-law.]

The appellant was summoned before the magistrates for offending against this by-law, when it was proved that on October 17, 1897, he persisted in singing in a public highway within fifty yards of a dwelling-house, after having been required by a police constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought.

The question reserved for this Court is whether the by-law is valid. If valid, the conviction is to stand. It is objected that the by-law is ultra vires, on the ground that it is unreasonable and therefore bad. It is necessary, therefore, to see what is the authority under which the by-law in question has been made, and what are the relations between its framers and those affected by it.

But first it seems necessary to consider what is a by-law. A by-law, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation: see *Edmonds* v. *Master, &c., of the Company of Watermen and Lightermen.* (1)

In the present case we are dealing with a by-law made by a

(1) (1855) 24 L. J. (M.C.) 124.

local representative body, namely, the county council of Kent, which is created under the Local Government Act, 1888, and is endowed with the powers of making by-laws given to municipal corporate bodies under the Municipal Corporations Act, 1882.

Sect. 16 of the Local Government Act, 1888, provides that a county council shall have the same power of making by-laws in relation to their county as the council of a borough have in relation to their borough; and it further provides that s. 187 of the Public Health Act of 1875 shall apply to such by-laws. I will take these statutes in the order of time.

Sect. 182 of the Act of 1875 provides that all by-laws made by a local authority under that Act shall be under their common seal, and may be altered or repealed by a subsequent by-law; but no by-law shall be repugnant to the laws of England or to the provisions of the Act. Sect. 183 gives power to impose penalties. Sect. 184 provides that by-laws shall not take effect until confirmed by the Local Government Board, which may allow or disallow them, and before their confirmation notice of intention to apply for confirmation must be advertised, and for a month at least before such application a copy of the proposed by-laws must have been kept at the office of the local authority for the inspection of ratepayers, and the clerk of the local authority is bound to furnish on application a copy of the proposed by-laws, or a part of them, to any ratepayer on a certain payment being made. Sect. 23 of the Act of 1882 provides that the council of a borough may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner, and they may, by such by-laws, appoint such fines, not exceeding 5*l.*, as they deem necessary for the prevention of offences against the by-laws. It is under this authority that the by-law in question was framed.

What are the checks or safeguards under which this very wide authority of making by-laws is exercisable? The same s. 23 further provides that no by-law can be made unless two-thirds of the whole number of the council are present; and,

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when so made, it shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall; and it shall not come into force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those forty days the Queen, with the advice of her Privy Council, disallows a proposed by-law or part thereof, such by-law, or such part, shall not come into force, and the Queen may, within the forty days, enlarge the time within which the by-law shall not come into force. We thus find that Parliament has thought fit to delegate to representative public bodies in town and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards. There must be antecedent publication of the by-law with a view, I presume, of eliciting the public opinion of the locality upon it, and such by-laws shall have no force until after they have been forwarded to the Secretary of State. Further, the Queen, with the advice of her Privy Council, may disallow the by-law wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the Court of the responsibility of inquiring into the validity of by-laws where they are brought in question, or in any way affects the authority of the Court in the determination of their validity or invalidity. It is to be observed, moreover, that the by-laws having come into force, they are not like the laws, or what were said to be the laws, of the Medes and Persians—they are not unchangeable. The power is to make by-laws from time to time as to the authority shall seem met, and if experience shews that in any respect existing by-laws work hardly or inconveniently, the local authority, acted upon by the public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that, should experience warrant that course, the Legislature which has given may modify or take away the powers they have delegated. I have thought it well to deal with these points in some detail, and for this reason—

that the great majority of the cases in which the question of by-laws has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, "benevolently" interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey* v. *Williamson* (1), an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find

(1) (1873) L. R. 8 Q. B. 118, at p. 124.

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no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

So much for the general considerations which, it seems to me, ought to be borne in mind in considering by-laws of this class. I now come to the by-law in question.

It is admitted that the county council of Kent were within their authority in making a by-law in relation to the subject-matter which is dealt with by the impeached by-law. In other words, it is conceded, and properly so, that the local authority might make a by-law imposing conditions under which musical instruments and singing might be permitted or prevented in public places; but it is objected that they had no authority to make a by-law on that subject in the terms of this by-law. Further, it is not contended that the by-law should, in order to be valid, be confined to cases where the playing or singing amounted to a nuisance; but the objections are, as I understand them, that the by-law is bad—first, because it is not confined to cases where the playing or singing is in fact causing annoyance, and next, because it enables a police con-

stable to bring it into operation by a request on *his* part to the player or singer to desist. As to the first of these objections, if the general principles upon which these by-laws ought to be dealt with are those which I have already stated, it is clear that the absence of this qualification cannot make the by-law invalid. But, further, such a qualification in my judgment would render the by-law ineffective. What is to be the standard of annoyance? What may be a cause of annoyance to one person may be no annoyance, and may even be pleasurable, to another person. Again, who is to be the judge in such case of whether there is or is not an annoyance? Is it to be the resident of the house within fifty yards of the playing or singing; or is it to be the magistrate who hears the charge? It is enough to say that, in my judgment, the absence of the suggested qualification cannot make the by-law invalid, even if it be admitted that its presence would be an improvement.

As to the second objection—namely, that the policeman has the power of putting the by-law into operation by requiring the player or singer to desist—I again say that, even if the absence of this power would be an improvement, and would make the by-law in the apprehension of some more reasonable, it is not, on the principles I have already stated, any ground for declaring the by-law to be invalid. In support of this objection pictures have, in argument, been drawn—more or less highly coloured—of policemen who without rhyme or reason would or might gratuitously interfere with what might be a source of enjoyment to many. In answer, I say a policeman is not an irresponsible person without check or control. If he acts capriciously or vexatiously, he can be checked by his immediate superiors, or he can be taught a lesson by the magistrates should he prefer vexatious charges. If the policeman persisted in saying that the musician should desist when the people in the neighbourhood desired his music, his gratuitous interference would promptly come to an end. Nor is it correct to say, as has been erroneously stated in some of the cases cited, that the magistrate would be bound in every case to convict where the musician did not desist when called upon. It is clear that under s. 16 of the Summary Jurisdiction

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Act, 1879, the magistrate, if he thinks the case of so trifling a nature that it is inexpedient to inflict any punishment, may, without proceeding to conviction, dismiss the information. The facts of this case are certainly no illustration of the by-law having been gratuitously or vexatiously put in force. The case states that, although it was not proved that the occupier of the house within fifty yards had, on the day in question, requested the constable to require the appellant to desist, yet it was proved that the singing was an annoyance to the occupier, and that he had on previous occasions complained to the police of such singing. Indeed, it was stated during the argument that the conviction here appealed from was the second conviction of the appellant for an offence against this by-law.

I have carefully read the cases cited in argument, but I do not propose to consider them in detail. Many of them relate to by-laws made under different statutes; others it is difficult to reconcile; few deal with the principles upon which by-laws like those in question are to be dealt with by the Courts; and some of them—as, for instance, *Munro* v. *Watson* (1), and perhaps *Johnson* v. *Mayor of Croydon* (2)—may be distinguished from the present case. In weighing previous authorities it is further to be recollected that the cases have come before Divisional Courts usually consisting of two members, and that, those cases being in their nature criminal, there has been no judgment of a Court of Appeal upon them. It is for this reason that the present special Court has been constituted. I cannot doubt that this Court has authority to review and, if it thinks fit, to differ from any prior decision of a Divisional Court on this subject: see *Fortescue* v. *Vestry of St. Matthew, Bethnal Green.* (3)

I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the by-laws made by representative public bodies are to be considered. There is one notable exception. I refer to the case of *Slattery* v. *Naylor.* (4) That was a case in the Privy

(1) 51 J. P. 660.
(2) 16 Q. B. D. 708.
(3) [1891] 2 Q. B. 170.
(4) 13 App. Cas. 446.

Council in which the members of that Court had to consider the validity of a by-law passed by the municipal council of the borough of Petersham, in New South Wales, under the provisions of the Municipalities Act, 1867. The Court consisted of Lords Hobhouse, Herschell, and Macnaghten, Sir Barnes Peacock, and Sir Richard Couch. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that beyond doubt the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the by-law there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which by-laws of representative governing bodies made under statutory authority should be considered. That it has done thoroughly and clearly.

In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable by-law; but, whether I am right or wrong in this view, I am clearly of opinion that no Court of law can properly say that it is invalid.

In the result the conviction appealed from must, in my opinion, be affirmed; but as the question is one of wide importance, and as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

SIR F. H. JEUNE, President of the P. D. and A. Div. The by-law of which the validity is in question on this appeal, in effect, makes it an offence to perform music or singing in a public place or highway within fifty yards of a dwelling-house, if an inmate of such house, or if a police constable, require the performer to desist. The provisions as to the inmate and as to the police constable give rise to somewhat different considerations. The sole question is whether this Court should hold that, in its judgment, this by-law is invalid because it is unreasonable. I agree with the contention urged before us

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that it is material to consider by what authority the by-law was made. It was made by the county council of Kent—that is to say, a public representative body to which Parliament has confided the duty of making by-laws for the good rule and government of the inhabitants of Kent and the prevention of nuisances in that county. Three considerations appear to me to apply with especial force to such an authority, dealing with such subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations such as dock or railway companies, who often have a pecuniary interest in their by-laws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as a county council must be credited with adequate knowledge of the locality, its wants and wishes. Thirdly, the opportunity afforded by legislation for a request for reconsideration, and an appeal to higher authorities, by members of the public shews that any by-law which comes into force has secured at least the acquiescence of those whom it affects. Cases may be imagined in which, in spite of these considerations, this Court, acting in the discharge of its undoubted powers and duty, might feel compelled to hold a by-law made by a county council invalid on the ground that it was unreasonable. But, when a question of the requirements and wishes of the locality is involved, this Court should, I think, be very slow to set aside the conclusions of the local authority. If support be needed for this opinion, it is to be found in the language of the Privy Council in the case of *Slattery* v. *Naylor* (1), an appeal which came from a colony to which the settlers carried the law of England, and which was very fully considered by a Court of high authority. I will quote only one among several passages which might be referred to. Lord Hobhouse, in delivering the judgment of the Court, said (2): "The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen,

(1) 13 App. Cas. 446. (2) 13 App. Cas. at p. 452.

the same jurisdiction has been exercised over them. But in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."

The main ground of objection taken to this by-law is, as I understand it, that it does not require proof that annoyance has, in the particular instance, been caused by the musical performance complained of. It is undoubtedly true that in several cases it has been held by this Court that the absence of a provision that annoyance or nuisance must be shewn renders the by-law unreasonable. But such cases appear to me to be distinguishable from the present. I will take as an example one of them, in which the subject-matter is similar to that in this present case. In *Johnson* v. *Mayor of Croydon* (1) it was held that a by-law prohibiting, in effect, music other than military music in the streets in the borough on Sunday was unreasonable, on the ground, as I understand it, that it did not require evidence of annoyance being caused. It is obvious that for aught contained in such a by-law a musical performance subject to condemnation under it might have taken place on a spot where no one could be annoyed, or in a manner to which no one felt any objection. But it is not necessary that a requirement of evidence of actual annoyance should be prescribed in terms; it is enough if the circumstances render annoyance certain, or even probable. For example, it has been held that a by-law forbidding the keeping of pigs within one hundred feet from a dwelling-house in a populous place is reasonable: *Wanstead Local Board* v. *Wooster*. (2) The case of *Slattery* v. *Naylor* (3), where it was held reasonable to prohibit burials within one hundred yards of public buildings, dwelling-houses, or public roads, is another illustration of the same principle. These were instances of matters by which any one affected would presumably be annoyed. But a musical performance in a street is not a thing in its nature certain to annoy any one. It is only an annoyance if some one who hears it thinks it one to him. In the by-law before us it is,

(1) 16 Q. B. D. 708. (2) 37 J. P. 403.

(3) 13 App. Cas. 446.

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accordingly, provided that an offence is committed only if the performance takes place within fifty yards of a dwelling-house, and has been objected to by an inmate of such house. (I will deal with the provision as to the constable presently.) To my mind, this insistence on the place of the performance, and on objection being taken by an inhabitant affected, may be considered to supply the element which in the cases I have referred to appeared to this Court to have been wanting. People who live in public streets must submit to the primary purposes for which streets exist. They must put up with frequent annoyances of traffic and occasional annoyances from the opening of roads for repair, for the supply of gas, water, or electricity, or for building operations in their vicinity. But street music is not a primary purpose of a street. It may be harmless if no one who lives there objects to it; it may even be acceptable to the locality; but if an inhabitant affected entertains and signifies an objection, I do not think that this Court should consider that a county council, in giving him a veto upon it, pursues an unreasonable course. The by-law provides in the alternative that a police constable may require the performer to desist. Whether this be an unreasonable provision or not appears to me to depend on the view taken as to the probable action of a police constable in such a manner. If it is thought he will act harshly and without fair grounds of public order or comfort, it would be unreasonable to invest him with such discretion. But if it be believed that he will act either in assistance of an inhabitant entitled to object, but who does not desire to be involved in a not improbable altercation, or because he sees that public order is concerned, it is not unreasonable that he should be entrusted to exercise a discretion on the requirements of the case. Which of these two views is to be taken seems to me precisely a matter on which the judgment of the county councillors is entitled to be respected, especially as probably most of them are magistrates. I for one cannot pretend to know whether a Kent policeman may be trusted to do his duty fairly and properly as well as, I have no doubt, they do. The case of *Alty* v. *Farrell* (1), which was cited to us as

(1) [1896] 1 Q. B. 636.

authority against the reasonableness of conferring on policemen such powers as are given in the present case, appears to turn on the power of the borough, under the Act in question, to delegate their authority to all constables instead of to persons especially appointed to execute the provisions of the Act. Further, it is not to be forgotten that an important safeguard is provided by the Legislature against the exceptional caprice of an inhabitant or abuse of discretion by a policeman, because the 16th section of the Summary Jurisdiction Act, 1879, enables the magistrate to dismiss an information if he thinks that the charge, though proved, was in the particular case of a trifling nature.

I agree with the Lord Chief Justice of England that this conviction should be affirmed, but without costs.

MATHEW J. The by-law in question had been made under the Local Government Act of 1888, with which were incorporated certain provisions of the Public Health Act, 1875, and the Municipal Corporations Act, 1882.

By one of the incorporated sections, namely, s. 23 of the Act of 1882, the county council were enabled to make such by-laws as to them seemed meet for the good rule and government of the district under their jurisdiction, and for the prevention and suppression of nuisances not already punishable in a summary manner.

By the same section, in accordance with the usual practice where statutory powers to make by-laws are conferred, certain formalities were directed to be observed before the local enactments came into operation. These formalities, it was admitted, had been complied with, and the first question which presented itself was whether the by-law in question had been thereby legalised.

By 19 Hen. 7, c. 7, which recited a previous Act which had been allowed to expire, it was provided that no masters, wardens, and fellowships of crafts or mysteries, nor any rulers of guilds or fraternities, should take upon them to make or to execute any acts or ordinances by them theretofore made in disheritance or diminution of the prerogative of the Crown or

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of others, nor against the common profit of the people; but that the same acts or ordinances should be examined and approved by the Chancellor, Treasurer of England, or Chief Justices of both benches, or three of them, or before both the justices of assize in their circuit or progress in that shire where such acts or ordinances were made, on pain of forfeiting 40*l.* for every time that they should do to the contrary.

It was decided in very early times that the approval of the by-law by the authorities mentioned in the statute did not give it validity if not otherwise legal: *Ipswich Taylors' Case* (1); *Stationers' Co.* v. *Salisbury* (2); 2 Kyd on Corporations, 109. The validity of the by-laws must be determined by the judges when they are brought properly before them. This duty has been cast on the Superior Courts where any restriction is sought to be imposed on personal liberty, and is traceable to the clause in the Great Charter, "Nullus liber homo, disseisiatur de . . . . libertatibus suis . . . . nisi . . . . per legem terræ." This rule has been followed and acted upon down to the present time. The power to make by-laws is conferred upon a vast number of corporate bodies and associations created by charter, or by statute, as, e.g., municipal bodies, companies for trading or other purposes, literary and scientific associations, and such institutions as the University of London and the College of Surgeons: see for further instances Lumley on By-laws, p. 164.

From the many decisions upon the subject it would seem clear that a by-law to be valid must, among other conditions, have two properties—it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable: see *City of London Case* (3); Com. Dig. By-law, B 1; *Framework Knitters' Co.* v. *Green* (4); *Eagleton* v. *East India Co.* (5)

The by-law in question was, so far as is material to my judgment, in the following form:—

No. 4: "No person shall sound or play upon any musical or

(1) (1614) 11 Co. Rep. 53, a.
(2) (1693) Comb. 221, at p. 222.
(3) (1609) 8 Co. Rep. 121, b.
(4) (1696) 1 Ld. Raym. 113.
(5) (1802) 3 B. & P. 55.

noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable to desist."

It was contended on behalf of the appellant that the by-law was not reasonable and was not certain. It forbade, without qualification of any kind, conduct which might be perfectly innocent and unobjectionable. It did not provide, as has been done in similar enactments and in the county council's by-law No. 3, that the Act prohibited should be an annoyance to any one. It contained no exception, and would, according to its terms, condemn all music and singing within fifty yards of a dwelling-house as in the nature of a nuisance. The right to prohibit was conferred on any policeman. Why should liberty of conduct, it was asked, be so interfered with? A policeman has no such authority in the metropolis: Why should a policeman in the country be entrusted with powers so easily abused?

For the respondent it was argued that the by-law was well enough. It had been framed by a representative body, created under recent legislation, whose regulations should be indulgently treated. It must be taken, it was said, that Parliament intended that local authorities should be upheld, and to this end that new canons of construction should be adopted by the Courts to preserve their by-laws from being declared invalid. It was no longer enough to point out that a by-law according to its terms was unreasonable; it should be upheld if it might be reasonably enforced, and it was no longer an objection that it might be unreasonably enforced. It was urged that there were adequate safeguards for the public which, though not expressed, ought to be implied. It was true that any policeman might prohibit acts of which no reasonable man ought to complain; but it was said that confidence might be reposed in the discretion of a policeman, and that he would not be likely to interfere unreasonably. This seems to me too generous a view of the qualifications of the ordinary constable. There was, it was said, a further safeguard, namely, that the county council would not sanction interference by the police unless there was some good cause. But a by-law once made could

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not be, and ought not to be, controlled in its operation by the members of the council. Further, the policeman who interfered without good cause would, it was argued, be reprimanded by his superiors, or a magistrate would probably refuse to issue a summons. These suggestions imply that there would be cases in which a constable ought not to have the power to prohibit or to prosecute. It seems to me that the public ought to be informed in clear language what these cases were. It would not be satisfactory to a person, who was innocent of any real offence and was summoned as a criminal, to have an apology offered to him on the ground that the policeman had been wanting in discretion. Again, it was said that the magistrate would have the power to refuse to convict, in a trifling case, under s. 16 of the Summary Jurisdiction Act; but the by-law affords no security that this power would be exercised. A magistrate might reasonably consider that he was bound to convict; for a by-law once duly published becomes part of the law of the land in the locality to which it applies. It should be remembered that this by-law has been made for the purpose of securing the good rule and government of the district. It would appear not to be well calculated in its present form to secure any such result. The interference of a policeman, which the by-law permits, would not be unlikely, it seems to me, to produce angry altercation, and to lead to a breach of the peace. I do not propose to refer at length to the cases cited in the argument where by-laws made under local authority have in recent times been condemned as unreasonable. In none of those cases is there any indication of the principle which I understand to be now contended for, namely, that such ordinances should receive a special kind of interpretation. The powers conferred on county councils have been spoken of in the discussion as something previously unknown to the law. But from the earliest times when charters were granted to towns municipal affairs have been managed by elected representatives of the inhabitants. The by-laws made by such bodies have been frequently declared to be invalid. Take, for instance, the by-laws which have been held to be unreasonable restraints of trade, and which are referred to in the judgment in *Mitchell* v.

Reynolds. (1) No case has been cited in which there is any trace of the principle now contended for, that such by-laws are to be interpreted with any particular indulgence because of their popular origin. If this view be adopted, it seems it me the judges will be placed in an anomalous position. Where they differ from bodies not popularly elected their jurisdiction to pronounce upon the validity of a by-law would remain unimpaired; but where they differed from bodies like a county council, their position would be altogether different. They would be bound to uphold what in other cases they would be right in condemning. I concur in the view that deference should be shewn by the Courts to the by-laws of a local authority, which may appear to interfere unduly with personal liberty, but where there was reason to suppose that the regulations were called for by the requirements of the particular place. There may be peculiar circumstances in the condition of a borough or part of a county which make stringent regulations as to personal conduct necessary. In that sense, I agree, a by-law ought to receive an indulgent interpretation. But this by-law is not confined to a particular locality; it applies to the whole of rural Kent.

It seems to me that what we are asked to do in this case is not to interpret the by-law, but to frame a new enactment with the necessary safeguards for freedom of conduct. It is pratically proposed that we should add a proviso to the by-law as it stands to the effect that it ought not to be unnecessarily or unreasonably enforced. This I consider we have no power to do. The only authority relied upon for the novel principle contended for by the respondent was the judgment of the Privy Council in *Slattery* v. *Naylor*. (2) In that case, a by-law had been made by a local authority in the Colony of New South Wales for regulating interments in cemeteries. Under its provisions interments in a particular place had been prohibited. The Court held the by-law was valid. It is difficult to see how any doubt could have existed on the subject. This decision was sufficient to dispose of the case; but it would seem that an argument had been addressed to the Court that the compliance

(1) (1711) 1 Sm. L. C. 10th ed. p. 391. (2) 13 App. Cas. 446.

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with the statutory requisites provided by the colonial law had been sufficient to render the by-law valid, and I gather that this view was favourably entertained by their Lordships. The argument was that the by-law was legalised by force of s. 158 of the Colonial Act under which it had been made, and which provided that all by-laws consistent with the provisions of the Act, and not repugnant to any other Act or law in force in the colony, should have the force of law when confirmed by the governor and published in the Government *Gazette*.

It seems to me clear that the case is only an authority on a question of colonial law, and I do not find in the judgment any indication of an intention to pronounce an opinion on the decisions of our Courts, which declare what has been understood to be the law of England on this subject. I have been unable to find any authority in our books for the suggestion that the validity of a by-law can be established in any other way than by a judgment of a Court of law as to its meaning according to ordinary rules of construction.

In my judgment this by-law should be amended. It came into operation on May 19, 1897, and the offence with which it deals is therefore of very recent creation. As it stands, any constable may prohibit any singing on any highway within fifty yards of a dwelling-house in any parts of the county of Kent, except such as are within any municipal borough. It has been suggested that the real intent of the council was to prevent noisy demonstrations which would be offensive to residents within their jurisdiction. If this were so, it becomes difficult to understand why this intention was not stated in plain terms, and why the language should be so wide of the mark. It seems to me of special importance, where the aid of constables is invoked to maintain order, that the duties of the police on the one hand, and the obligations of the public on the other, should be stated with reasonable clearness. Laxity in the preparation of local enactments is not to be encouraged.

I regret to be unable to concur in the view of the majority of my colleagues. Their judgment appears to me to conflict with the recent decisions referred to in the course of the discussion, and with the views expressed by Sir Henry Hawkins, the late

Mr. Justice Cave, the present Master of the Rolls, and the late Lord Justice Kay. In the case of *Alty* v. *Farrell* (1), a by-law which gave a policeman an unqualified right to require a vendor of coals in small quantities to weigh the coal in the policeman's presence was held to be unreasonable and invalid, because the power might be exercised oppressively. This principle seems to me applicable to the present case. The decision of *Alty* v. *Farrell* (1) has the high authority of the Lord Chief Justice and Wright J.

The judgments of the majority of the judges by whom this case is decided will no doubt be entitled to great respect from those who may have similar cases to deal with; but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the differences of judicial opinion that may arise in cases like the present. A change of procedure would seem to be necessary which would permit an appeal in the ordinary way.

I am of opinion that this conviction should be quashed.

The rest of the Court (Chitty L.J., Wright, Darling, and Channell JJ.) concurred in the judgment delivered by Lord Russell of Killowen C.J.

Judgment for the respondent.

Solicitors for appellant: *Schultz & Sons, for A. J. Ellis, Maidstone.*

Solicitors for respondent: *Kingsford, Dorman & Co., for Hoar, Howlett & Tatham, Maidstone.*

(1) [1896] 1 Q. B. 636.

W. A.

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May 4.

[IN THE COURT OF APPEAL.]

TRINDER, ANDERSON & CO. *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY.

TRINDER, ANDERSON & CO. *v.* NORTH QUEENSLAND INSURANCE COMPANY.

TRINDER, ANDERSON & CO. *v.* WESTON, CROCKER & CO.

Insurance, Marine—Policy—Loss by Negligence of Master—Master also Part Owner.

In an action by the owners of a ship, including the master, on a policy of marine insurance, for loss within the perils insured against, the fact that the loss arose through the negligent navigation of the master, not amounting to wilful negligence, affords no defence to his claim.

Appeals from judgments of Kennedy J.

The first-named action was against underwriters, and was brought by the plaintiffs on behalf of themselves and all other owners of the ship *Gainsborough*, including the master, who was part owner, for a total loss of freight. The vessel, the freight of which was insured, was stranded owing to the negligence, but not the wilful negligence, of the master. The principal question in the case was whether the fact that the master, through whose negligence the loss occurred, was part owner was a bar to his recovering in the action. A question as to the necessity for notice of abandonment under the circumstances of the case was also raised on the argument in the Court of Appeal.

Judgment was given for the plaintiffs.

The defendants appealed.

Feb. 8. *Joseph Walton, Q.C.*, and *Scrutton*, for the defendants. So long as the thing insured exists, though it may be badly damaged, the assured may treat the loss as partial; but if he elects to treat it as a total loss, he must give notice of

abandonment. In the case of cargo there is a concrete thing to deal with; but in the case of freight, though the difficulty of applying the principle is greater, it is still applicable.

[They cited *Rankin* v. *Potter*. (1)]

With regard to the question arising from the master being part owner, no doubt underwriters are not liable for a loss unintentionally caused by the assured; but here there was wilful negligence. The loss was the direct result of negligence which was persisted in up to the last moment. If the assured brings about the loss by his own act, whether by default, omission, or neglect, then he cannot recover on the policy: *Bell* v. *Carstairs* (2); *Pipon* v. *Cope*. (3) In a policy of insurance the underwriters promise to pay for losses occasioned by certain named perils; but if the act of the assured has caused the loss, then he cannot recover on the policy, even though the loss actually comes about through one of the perils insured against. In every policy there is an implied condition that the assured will not cause the loss of the ship by his own act or default, and that includes such negligence as that of which the plaintiff was guilty.

Robson, Q.C., and *Hurst*, for the plaintiffs. The facts shew that notice of abandonment would have been of no use, for the cargo must have been sold long before the underwriters could take any steps: *Roux* v. *Salvador* (4); *Rankin* v. *Potter*. (1)

It has never been suggested till the present case that the negligence of a part owner releases the underwriters from liability on their policy. *Pipon* v. *Cope* (3) can only have been decided in favour of the underwriters on the ground that the owners must have known of the repeated acts of smuggling which at last led to the loss of the ship.

The effect of *Thompson* v. *Hopper* (5) is that where the loss has happened by peril of the sea, that alone will be looked to unless there has been wilful misconduct, which has been negatived in this case.

(1) (1873) L. R. 6 H. L. 83.
(2) (1811) 14 East, 374.
(3) (1808) 1 Camp. 434.
(4) (1836) 3 Bing. N. C. 266.
(5) (1856) 6 E. & B. 937.

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The principle is illustrated by cases arising on a fire insurance: *Midland Insurance Co.* v. *Smith* (1); *Shaw* v. *Robberds.* (2)

[They also cited *Dudgeon* v. *Pembroke* (3); *Cornish* v. *Accident Insurance Co.* (4)]

Joseph Walton, Q.C., in reply.

Cur. adv. vult.

The case of *Trinder, Anderson & Co.* v. *North Queensland Insurance Co.* arose on a policy on the hull of the ship under the same circumstances as in the preceding case. The only point raised was that as to the effect of the negligence of a part owner.

The case of *Trinder, Anderson & Co.* v. *Weston, Crocker & Co.* arose on a policy on disbursements.

In each case Kennedy J. gave judgment for the plaintiffs, and the defendants appealed.

The cases were argued on March 23 by the counsel engaged in the first case.

Cur. adv. vult.

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May 4. A. L. SMITH L.J. read the following judgment:—

This is an action by shipowners for a total loss of freight, upon a policy of marine insurance covering freight, and the first point taken by the defendants, who are an underwriting company, is that, as neither the ship carrying the goods for the carriage of which the freight was to be earned, nor the goods themselves, were actual total losses, notice of abandonment must have been given by the plaintiffs to the underwriters upon freight to entitle them to recover for total loss of freight; the second point is that, as the stranding of the vessel which brought about the loss of freight sued for was caused by the negligent navigation (though not the wilful act) of one of the assured (he

(1) (1881) 6 Q. B. D. 561.
(2) (1837) 6 Ad. & E. 75.
(3) (1877) 2 App. Cas. 284.
(4) (1889) 23 Q. B. D. 453.

being part owner and captain of the ship), he cannot recover upon the policy.

The facts are as follows: Upon May 27, 1896, the plaintiffs caused a policy of marine insurance to be effected with the defendants against perils of the sea upon "freight chartered or as if chartered" in the ship *Gainsborough*, from Sydney to Newcastle, New South Wales, while there, and thence to any port or ports in New Zealand while there, and thence to San Francisco.

When the ship was proceeding on her voyage from New Zealand to San Francisco with a cargo of coals, the captain found himself short of water, and thereupon, justifiably as it has been held, put into Honolulu for water.

Upon nearing Honolulu on Saturday, August 29, 1896, owing, as it has been found, to his negligent navigation, the ship was run upon and became firmly stranded upon a reef, and commenced at once to make water. Endeavours were made to get her off by means of towing, but without avail; seas were washing over her decks, she was bumping heavily upon the reef and kept going further on, her cargo became wetted by the sea-water, and the ship and cargo were in a very critical and perilous position.

In these circumstances the captain took the opinion of Lloyd's agent at Honolulu, together with that of the harbour master there and of a Captain Campbell, and they agreed in advising him that, considering the condition and position of the ship and cargo, they should be at once sold; and upon Monday, August 31, 1896, they were accordingly sold situated as they were, and realized the sum of 374*l.*, the purchaser, Allen, having also to pay some charges to the amount of 43*l.*

It has been said that this sale was not justified at the time it took place; but the learned judge, my brother Kennedy, who tried the case, has found that the sale, although premature must have taken place within a few days of the time at which it did.

The ship and cargo remained upon the reef until September 26, 1896, when Allen commenced operations in order to get the ship and cargo off, a steam-pump having by that time been

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obtained. Some 200 tons of coal were then jettisoned; and upon October 4, 1896, the ship, with the remainder of her cargo in her, was got off.

This coal when got out of the ship was sold at Honolulu by Allen for 1000*l*.

Without dealing with the evidence in detail, in my judgment it shews that the sea damage which the ship had sustained, situated as it was 2000 miles from San Francisco, which was the nearest port at which the ship could be repaired to make her a cargo-carrying ship, and then only at a cost which would have exceeded the value of the ship when repaired, was such as would have justified an abandonment of ship and a claim against the underwriters upon ship for a total loss.

The learned judge has found "that it was not a practicable thing to carry on the cargo either in the stranded ship or in any other ship, for none could be obtained, and that it could not have been carried on, and no abandonment would have enabled the assurers to do so; that the cargo, although it did not actually perish, was in a condition in which it was not doubtful whether notice of abandonment could give the assurers any advantage, for it was quite clear it would not; that the cargo would have had to be sold at Honolulu, and that the freight by reason of the stranding was an actual total loss, and that there was a destruction of the voyage."

These being the findings of the learned judge, as there was clearly evidence to support them, I see no ground for differing from him.

There was no telegraphic communication between Honolulu and San Francisco or anywhere else. Honolulu, as before stated, was 2000 miles from San Francisco, and this was the nearest place to Honolulu wherefrom to communicate with England. Had notice of abandonment of freight been given by the master from Honolulu, as the underwriters upon freight now contend it should have been, it would have taken from five to six weeks before the underwriters could have communicated with Honolulu.

The evidence shews that the coal in its wet state could not have been carried on board any ship from Honolulu to San

Francisco by reason of its inflammable condition and liability to spontaneous combustion.

It could have been dried at Honolulu; but it was proved that the process of unshipping, drying, reshipping, and afterwards conveying coal on to its destination is such that, besides the heavy cost of drying, the coal itself becomes greatly deteriorated and damaged, and, as before stated, the learned judge has found that the sale of the coal at Honolulu must have taken place within a few days of the time at which it was actually sold.

It was argued for the underwriters that, as there was no actual total loss of the ship, for she remained a ship after the stranding and is so still, and that as there was no actual total loss of the cargo, for it remained coal after the stranding as before though wetted and greatly deteriorated and depreciated in value, the assured could not recover for a total loss of freight unless notice of abandonment of freight had been given to underwriters upon freight. Now, the question of giving notice of abandonment upon a policy covering freight is distinct from the question of giving notice of abandonment upon a policy upon ship, and they must be kept apart.

At one time there was a conflict of opinion upon this question of giving notice of abandonment, Lord Abinger, in *Roux* v. *Salvador* (1), holding that there were cases in which, although the subject-matter insured remained in specie, notice of abandonment need not be given. Lord Campbell, on the contrary in *Knight* v. *Faith* (2), holding that notice of abandonment must be given in all cases except in cases of total loss. This controversy was finally, as regards a policy on freight, determined in the case of *Rankin* v. *Potter* (3) in the House of Lords, in which case the judges were called in to advise the House as to the necessity of an assured upon freight in all cases giving notice of abandonment, in the case of a constructive total loss of ship, before he could recover for a total loss of freight. Lord Abinger's view was supported.

In *Rankin* v. *Potter* (3) the appellants (the underwriters upon freight) contended that by the insurance law of England, where

(1) 3 Bing. N. C. 266. (2) (1850) 15 Q. B. 649.
(3) L. R. 6 H. L. 83.

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the thing insured existed in kind, however deteriorated or damaged, there could be no total loss without notice of abandonment, and one of the questions asked by the House of the judges was this: (2.) Was notice of abandonment either of ship or freight, or of both, necessary to enable the plaintiffs to recover for a total loss on the policy on freight? In this case the subject-matter of insurance was chartered freight.

I will cite a passage from the opinion of Brett J., given in answer to the question asked, for it is very pertinent to the present case. That learned judge says (1): "I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost, and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight."

It will be also seen upon reading the opinion of Blackburn J. given to the House in this case that that learned judge (2)

(1) L. R. 6 H. L. at p. 102. (2) L. R. 6 H. L. at p. 121.

combats the contention that there was a technical rule of insurance law by which notice of abandonment must be given if the thing exists in specie at all, though the state of things was such that the underwriters could do nothing even if they had the notice. He says: "I think this" (notice of abandonment) "is from the nature of things confined to cases where there are some steps which the underwriters could take, if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owner's election. . . . . If there was nothing they could do, no notice I think is required"; and in another part of his opinion the learned judge says (1): "But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through."

Lord Chelmsford, in delivering his opinion to the House, points out (2) that considerations having reference to a policy on freight must be kept entirely separate and apart from considerations having reference to a policy on ship, and, after discussing the conflicting cases of *Knight* v. *Faith* (3) and *Roux* v. *Salvador* (4), gave judgment upon the principles laid down by Brett and Blackburn JJ. above alluded to; and the House of Lords held that the assured, in the circumstances of that case, could recover for a total loss of freight.

It seems to me that in the present case, applying the principles laid down in *Rankin* v. *Potter* (5) by the House of Lords, the circumstances were such (*a*) as to authorize an abandonment of the ship on a policy on ship; (*b*) that there was no chance of an opportunity of the cargo being forwarded in a substituted ship for no other could be obtained; (*c*) that this was not a matter of doubt; (*d*) that the ship itself could earn no freight on the voyage insured; (*e*) that there was nothing which the underwriters upon freight could have done had notice of abandonment been given to them, and it would only have been an idle ceremony to have done so.

Five years after this decision in *Rankin* v. *Potter* (5) in the

(1) L. R. 6 H. L. at p. 124.
(2) L. R. 6 H. L. at p. 155.
(3) 15 Q. B. 649.
(4) 3 Bing. N. C. 266.
(5) L. R. 6 H. L. 83.

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House of Lords, Brett L.J. in this Court, in *Kaltenbach* v. *Mackenzie* (1), when considering the necessity of giving notice of abandonment upon a policy upon ship, made some observations as to what had been decided in *Rankin* v. *Potter* (2) in the House of Lords, which, if applicable to a policy upon freight, would raise a difficulty in the present case.

That learned judge when, as before stated, dealing with a policy upon ship, said (3): "I am not prepared to say that if it could be shewn that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act"—i.e., give notice of abandonment—"is in such a condition that it would absolutely perish and disappear, before notice could be received or an answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say that nothing short of that would excuse him; and although I do not say what I have stated would excuse him, I am not prepared to say it would not."

Cotton and Thesiger L.JJ. gave judgment to the like effect, and held that, as the ship had not ceased to exist and been entirely lost at the time when notice of abandonment should have been given, the assured could not recover for a total loss on a policy upon ship.

It appears to me that the learned judges were dealing in this case of *Keltenbach* v. *Mackenzie* (4) with a loss occasioned by a sea peril upon an insurance upon ship, and not with a loss of freight upon a policy on freight which, as pointed out by the House of Lords, are contracts entirely independent of each other, and that what I have already said about the case of *Rankin* v. *Potter* (2) governs the present. I am of opinion, therefore, that the first point, as to the necessity of there being a notice of abandonment given in the present case, fails the defendants.

The second point taken is that inasmuch as the ship was run upon the reef by the negligent navigation, though not wilful act, of the captain, as he was one of the assured, he cannot recover upon the policy.

(1) (1878) 3 C. P. D. 467.
(2) L. R. 6 H. L. 83.
(3) 3 C. P. D. at p. 475.
(4) 3 C. P. D. 467.

It cannot be doubted that a policy upon ship covering perils of the sea covers a loss brought about by the negligent navigation of the captain and crew, if such loss is immediately caused by a peril of the sea.

It was held over fifty years ago in *Dixon* v. *Sadler* (1) that an assured of ship makes no warranty to the underwriters that the master and crew will do their duty during the voyage, and consequently their negligence is no defence to an action on a policy when the loss is brought about by their negligent navigation, if the loss is immediately occasioned by the perils of the sea. Parke B., when delivering the judgment of the Court, cited five cases in support of this proposition, commencing as far back as the year 1818 with the case of *Busk* v. *Royal Exchange Assurance Co.* (2)

That the negligent navigation of a ship by a person other than the assured affords no defence to an action upon a policy of marine insurance against perils of the sea when the loss is immediately occasioned by a peril of the sea is clear, the reason, in my opinion, being that what is insured against is a peril of the sea, which is none the less a peril of the sea though brought about by negligent navigation. Is there, then, any warranty by a part owner, if he be one of the assured, that he will not personally be guilty of negligent navigation during the voyage covered by the policy? We are not dealing with a loss brought about by the wilful act of an assured. Negligent navigation has never been held to be equivalent to "dolus," or the "misconduct" which is spoken of by Lord Campbell in *Thompson* v. *Hopper* (3); nor is it the negligence referred to by Lord Ellenborough in *Bell* v. *Carstairs* (4), the case of insurance against capture.

It cannot be doubted that the legal maxim, "In jure non remota causa sed proxima spectatur," applies when considering what are the particular perils for which an assurer undertakes to be liable upon a policy of marine insurance, if such maxim contravenes no principle of insurance law and is not hostile to the manifest intention of the parties: see per Lord Campbell

(1) (1839) 5 M. & W. 405.
(2) (1818) 2 B. & A. 73.
(3) 6 E. & B. 937.
(4) 14 East, 374.

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in *Thompson* v. *Hopper*. (1) It is not disputed at the bar that negligence of an assured upon a fire policy, whereby the fire was occasioned which caused the loss, affords no defence to the insurer. Why so? Because loss by fire is what is insured against; so in a marine policy sea perils are what are insured against. The risk undertaken by an underwriter upon a policy covering perils of the sea is that, if the subject-matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and, in my judgment, it matters not if the loss or damage is remotely caused by the negligent navigation of the captain or crew, or of the assured himself, always assuming that the loss is not occasioned by the wilful act of the assured. In this last case the maxim above referred to, "causa proxima non remota spectatur," does not apply for the reasons pointed out by Lord Campbell in *Thompson* v. *Hopper* (2), for there not only does the maxim contravene the principles of insurance law and the manifest intentions of the parties, but is qualified by another legal maxim, "Dolus circuitu non purgatur."

I believe that there cannot be found in the insurance law of England a single case to support the proposition now contended for by the underwriters, which is that, assuming the loss has not been occasioned by the wilful act or default of the assured but is immediately caused by a peril of the sea, the remote and not the proximate cause is to be looked to.

There are, on the other hand, cases which, in my judgment, strongly go to shew that what I am saying is the law. I refer again to *Thompson* v. *Hopper* (3), and the case in the House of Lords of *Dudgeon* v. *Pembroke*. (4) In each of these cases the underwriters were sued upon time policies for losses immediately occasioned by perils of the sea.

It never suggested itself to the underwriters to attempt to defend themselves upon the ground that the losses were occasioned by the negligence of the assured, but, on the contrary, in the first case the defence was founded upon the assured having "knowingly, wilfully, wrongfully, and improperly" committed acts whereby the loss was occasioned and in the second

(1) 6 E. & B. at p. 947.
(2) 6 E. & B. at p. 948.
(3) 6 E. & B. 937.
(4) 2 App. Cas. 284.

case that the assured had "knowingly and without justifiable cause" sent the ship to sea in such an unseaworthy condition that the loss was thereby occasioned. If negligence of the assured, whereby the loss was occasioned, constituted a defence to the underwriters upon a policy covering perils of the sea, it is to me inconceivable that such defence was not set up, more especially when it is seen who the counsel were who appeared for the underwriters. The total absence of authority as to the point now suggested as being a valid defence, and the presence of authority where such a defence might have availed the underwriter, not being set up, to my mind is most significant. As Lord Penzance said in *Dudgeon* v. *Pembroke* (1), if what is now contended for be the law, "the underwriters have been signally supine in availing themselves of it. For there is no case that I am aware of, except those to which I have referred, in which anything like such a defence as this has been set up. The materials for such a defence must have existed in countless instances, and yet there is no trace of it in any case which has been brought to your Lordships' notice, still less any decision upholding such a doctrine."

My brother Kennedy has dealt with what cases have been pressed into the service of the underwriters as being authorities, which in reality they are not, and I do not go over them again. I agree in his judgment, and for the reasons above given I am of opinion that both points fail the defendants, and that the appeal must be dismissed.

COLLINS L.J. read the following judgment:—

I am of the same opinion. On the question of abandonment I think that, on the facts found, the case is concluded by *Rankin* v. *Potter*. (2) The arguments of the appellants were really those of the dissentient judges in that case.

As to the negligence point. I think this also is concluded by authority. There can be no doubt whatever that the proximate cause of the loss was a peril of the sea. It is now conclusively settled by the series of cases reported in the 12th App. Cas., of which *Hamilton* v. *Pandorf* (3) is the last, that "perils of the

(1) 2 App. Cas. at p. 296. (2) L. R. 6 H. L. 83.
(3) (1887) 12 App. Cas. 518.

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sea" mean the same thing whether they appear in a bill of lading, a charterparty, or a policy of assurance. But the rights of a party relying on an exception of sea perils in a contract of carriage may be very different from those of an assured claiming for a loss by the like perils under a policy. Negligence by the carrier will defeat his right to claim the benefit of the exception, not because it prevents the loss being a loss by sea perils, but because his negligence gives a cross right to the underwriter to an equivalent amount: see Lord Herschell's opinion in *The Xantho* (1), citing Willes J. in *Grill* v. *General Iron Screw Collier Co.* (2) The loss, therefore, being by a sea peril, the right of the assured is absolute unless his own conduct has given a cross right to the underwriter against himself. Now it has been settled by a long series of authorities that negligence of the assured's servants does not give such cross right, and does not therefore on the absolute contract of insurance relieve the underwriter from making good the loss of which a sea peril was the proximate cause.

"I may say," says Willes J., in the passage above referred to (3), "that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract and is caused by perils of the sea: the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant."

If, therefore, negligence of the owner's servants does not

(1) (1887) 12 App. Cas. 503, at p. 510.

(2) (1866) L. R. 1 C. P. 600, at p. 611.

(3) *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P. 600, at p. 611.

excuse the underwriter, as it does not, it must be because such negligence gives no cross right in a contract of insurance as it would in a bill of lading. These decisions, therefore, involve the proposition that the owner does not contract not to be negligent, otherwise the negligence of his servants, being just as much his negligence as it is under a bill of lading, would give the same cross right in both cases. Unless, therefore, the personal negligence of the owner works some personal disability upon him, he is entitled to enforce the contract of insurance. His negligence does not, any more than that of his servants, alter the character of the sea peril, which still remains the causa proxima, and it does not give a right of cross action, as it is not a breach of contract. The observations of Willes J. on this point in *Thompson* v. *Hopper* (1) in the Exchequer Chamber are again instructive. Dealing with the maxim "Dolus circuitu non purgatur," which had been pressed to support the contention that the personal act of the shipowner in sending an unseaworthy ship to sea was an answer to a claim against insurers on a time policy, he says (2): "Dolus therein stands for dolus malus, and cannot mean simply anything which may lead to the damage of another. . . . Without entering into a discussion of the precise meaning of dolus or dolus malus in the civil law, I may say that, if dolus, in the sense in which it is used in the maxim, can exist independent of evil intention, it cannot so exist without either the violation of some legal duty, independent of contract, or the breach of a contract, express or implied, between the parties. To recognise in a court of justice dolus, or wrong, or misconduct, as a ground of action or defence, apart from these conditions, would be to confound all certainty in the law." The wilful default of the owner inducing the loss will debar him from suing on the policy in respect of it on two grounds, either of which would suffice to defeat his right: first, because no one can take advantage of his own wrong, using the word in its true sense which does not embrace mere negligence (see per Bramwell B. in *Thompson* v. *Hopper* (3)); secondly, because the wilful act takes from the catastrophe the accidental

(1) (1858) E. B. & E. 1038; 27 L. J. (Q.B.) 441.
(2) E. B. & E. at p. 1047.
(3) E. B. & E. at p. 1045.

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character which is essential to constitute a peril of the sea. "I think," said Lord Halsbury in *Hamilton* v. *Pandorf* (1), "the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'" Nothing short, therefore, of dolus in its proper sense will defeat the right of the assured to recover in respect of a loss of which but for such dolus the proximate cause would be a peril of the sea; and the law is so stated by Lord Penzance in *Dudgeon* v. *Pembroke* (2), in the passage referred to in the argument. "In effect," says Willes J. in a later passage in the judgment already quoted (3), "there being no violation of the law and no fraud in the assured, an increase of risk to the subject-matter of insurance, its identity remaining, though such increase of risk be caused by the assured, if it be not prohibited by the policy, does not avoid the insurance."

The cases relied on by the appellants do not support their contention. Those based on the absence of documents may be rested on two grounds, assuming that the act of the assured fell short of dolus, which is not clear—(*a*) that in the case of insurance against capture there is an implied contract that the ship shall be properly documented: it is put on this ground by Phillips, s. 745, and by Arnould, p. 668, 5th ed.; (*b*) that capture insured against being not the mere detention for the purpose of inspection of documents, but the taking "with intent to deprive the owner of all dominion or right of property over the thing taken" (Arnould, p. 748, 5th ed., citing Emerigon, p. 428), the want of documents may be regarded as the proximate cause of the loss. Willes J. in *Thompson* v. *Hopper* (4) explains these cases on this ground. Referring to *Bell* v. *Carstairs* (5), he says: "The loss was the immediate and direct result of the want of proper papers; and it was the duty of the owner of the ship, by the law which authorized its capture, if not by the general maritime law (see Roccus) to be provided with those papers; and the want of them was the direct, immediate, and only cause of the loss."

(1) 12 App. Cas. 518, at p. 524.
(2) 2 App. Cas. 284.
(3) *Thompson* v. *Hopper*, E. B. & E. 1038, at p. 1049.
(4) E. B. & E. at p. 1048.
(5) 14 East, 374.

Pipon v. *Cope* (1) is explained by Parsons in his work on Marine Insurance on the ground that the owners who were claiming in respect of loss by seizure for smuggling for the third time in three consecutive voyages must be taken to have assented to the barratrous acts of their servants (see p. 571). It was at all events crassa negligentia aequiparata dolo.

I entirely agree with the decision and reasons given by Kennedy J.

A. L. SMITH L.J. The Lord Chancellor concurs in the result of these judgments.

Appeal dismissed.

TRINDER, ANDERSON & CO. *v.* NORTH QUEENSLAND INSURANCE COMPANY.

TRINDER, ANDERSON & CO. *v.* WESTON, CROCKER & CO.

The judgment of the Court (Earl of Halsbury L.C., A. L. Smith and Collins L.JJ.) was read by

A. L. SMITH L.J. These two appeals, which are also by underwriters, depend upon what we have held in the case of *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.*; and as we are against the underwriters, for the reasons given in the case, these appeals must also be dismissed.

Appeals dismissed.

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 1 Camp. 434.

A. M.

C. A.
1898
May 4.

[IN THE COURT OF APPEAL.]

WESTPORT COAL COMPANY *v.* McPHAIL.

Ship—Bill of Lading—Exception—Negligence of Master—Master also Part Owner—Applicability of Exception.

A bill of lading was signed by the defendant, who was master and part owner of the ship, on behalf of himself and his co-owners. It contained an exception in respect of "the neglect and default of master in navigating the ship." The cargo was lost by the stranding of the ship through the negligence, but not the wilful negligence, of the defendant. In an action by the owners and shippers of the cargo:—

Held, that the negligence which caused the loss was that of the defendant exclusively as master and not as part owner, and was within the exception.

APPEAL from a judgment of Kennedy J.

This was an action by the owners and shippers of coal under a bill of lading signed by the defendant as master of the ship on behalf of himself and his other co-owners of the ship *Gainsborough*.

The bill of lading excepted, among other things, "the neglect and default of master in navigation of the ship." The ship was stranded through the negligence, but not the wilful negligence, of the defendant.

The question was whether the exception covered the negligent navigation of the defendant. The action was brought against all the co-owners, but judgment was given for the plaintiffs against the defendant McPhail only.

The defendant McPhail appealed.

March 23. *Robson, Q.C.*, and *Joseph Hurst*, for the defendant. There is no antecedent presumption that the exception is not intended to apply to the master, and the words of the exception are express. It is true that in general a person does not contract to exempt himself from the consequences of his own negligence, but that rule does not apply to this class of contract. He cannot protect himself in any other way than by such an exception.

Joseph Walton, Q.C., and *Scrutton*, for the plaintiffs. The shipowner binds himself to deliver the cargo subject to the exceptions; but overriding the exceptions there is an independent and collateral obligation on the shipowner to use all due care. The plaintiffs had a right to expect that the shipowner would personally use all reasonable care to prevent loss.

[They cited *The Zantho* (1); *Hamilton* v. *Pandorf* (2); *Norman* v. *Binnington* (3); *Burton* v. *English* (4); *Taylor* v. *Liverpool and Great Western Steam Co.* (5); *Steinman* v. *Angier Line* (6); *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (7)]

Robson, Q.C., in reply. The cases cited illustrate the principle that where an ambiguity exists the contract is to be construed strictly against the owners. There is no ambiguity here, for the owners are not to be responsible for the negligence of the master—that is any master, whether a part owner or not.

Cur. adv. vult.

May 4. The judgment of the Court (Earl of Halsbury L.C., and A. L. Smith and Collins L.JJ.) was read by

COLLINS L.J. This is an action by owners and shippers of coal upon a bill of lading, signed by the defendant McPhail, who as master, on behalf of himself and his other co-owners of the ship *Gainsborough*, signed the bill of lading for the coals shipped thereon, and the facts stated in the judgment in the case of *Trinders, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.* (8), as far as material, apply to this case.

The following are the material parts of the bill of lading, upon the construction of which this case depends: "Shipped in good order and condition by the Westport Coal Company on board the good ship *Gainsborough*, whereof is master for the present voyage A. McPhail, lying in the port of Westport and bound for San Francisco, 1315 tons of coal to be delivered

(1) (1887) 12 App. Cas. 503.
(2) (1887) 12 App. Cas. 518.
(3) (1890) 25 Q. B. D. 475.
(4) (1883) 12 Q. B. D. 218.
(5) (1874) L. R. 9 Q. B. 546.
(6) [1891] 1 Q. B. 619.
(7) (1883) 10 Q. B. D. 521.
(8) Ante, p. 114.

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(subject to the exceptions hereinafter mentioned) in like good order and condition at the aforesaid port." The following are the exceptions: "The act of God . . . . barratry, the neglect and default of pilot, master or crew in navigation of the ship. (Signed.) A. McPhail, master."

The question is whether these exceptions are such as to cover the negligent navigation of the defendant McPhail, who was master of the *Gainsborough*, and was also interested in the ship as part owner.

On the first point made by the plaintiffs we are of opinion that the argument that, having regard to the words immediately preceding and following it, the word "master" in the exception must be read as not embracing a part owner who acts as master cannot prevail. If the exception was inapplicable to such a person, the other co-owners are not protected; the person who caused the mischief does not come within the description of master, against whose negligence they provided, and they have in fact made no contract relieving them from liability for his acts. Kennedy J. has held that they are protected, and there is no appeal against his decision.

The case of *Jones* v. *Nicholson* (1) decides that the relation of owners and captain may exist between part owners and one of their number, so as to entitle them to claim against underwriters in respect of his acts on a policy against barratry of master or crew, and it certainly would be a strange result if the exception of master's negligence were wholly nugatory wherever he had an interest as part owner.

It is also clear law that a party is not debarred from contracting against liability for his own negligence, and, therefore, there would be no personal incapacity in a part owner debarring him from setting up the exception of master's negligence, even though he were himself the master; and in another case the present defendant has been held entitled to recover against underwriters for a loss brought about by the same negligence that we are now discussing.

But though the defendant is, we think, to be treated as the master within the exception, and though he is not debarred

(1) (1854) 10 Ex. 28.

from relying upon it, whether he be sued as master or as owner, it does not follow that it suffices to relieve him from liability in this case. But it is very desirable to see what the precise ground is on which his non-immunity from liability must be placed. It is a well-established rule that exceptions must be strictly construed against the person for whose benefit they are inserted; and this rule has been frequently applied so as not to interpret them in bills of lading as relieving the owner from his obligation to take due care. This rule would debar us from reading into the exception any such words after "master" as would cover part owner's as distinguished from master's negligence. The exception, therefore, must be treated as not excusing a breach of the owners' duty as such. But it is at this point that the real difficulty arises. The captain is excused; the owner is not. But the holder of the bill of lading has given up the right to complain of loss traceable to the master's negligence, and it was the negligence of the master in the sphere of his duty as master which caused the loss—a loss, moreover, against responsibility for which he is certainly protected in his capacity as master by the bill of lading itself, which is signed by him, and in which he is expressly named. The plaintiffs seek to make him liable by viewing him in two different capacities—that is to say, they distinguish his capacities for the purpose of limiting the exception, but they mix them up again for the purpose of fixing him with liability as owner. But does it follow that because one and the same person is captain and part owner negligence in either capacity is to be deemed negligence in both? Or does not this question involve an examination of what his duty is in each capacity, so as to see whether there was in fact negligence in both? So far as the navigation of the ship is concerned, the duty of the owner, as distinguished from the master, would be to take due care to appoint a competent person; and, therefore, the defendant's co-owners in this case having discharged that duty, and being protected against the master's negligence, are not now charged with negligence as owners. Does it make any difference that the master cannot divest himself of his personality as part owner when he is engaged in duties which have been

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properly delegated to him as master? Tried by the converse case, if the owners had appointed a notoriously incompetent master whose incapacity had caused disaster, the exception of master's negligence would certainly not have protected them, and it would certainly have been no better protection to that one of their number who had been appointed captain in respect of that part of his negligence, which would clearly be negligence as owner and not as captain. Moreover, if the negligence of the captain in the proper sphere of his duty is to be deemed a breach of the owners' duty because the captain is also part owner, and cannot divest himself of his personality as such, it would follow that the other co-owners are liable. They are not protected against negligence of owners. The same person who as captain is their agent is also part owner, and on the hypothesis was negligent.

If, therefore, they have been rightly held excused, it can only be because his negligence as captain is treated as the only negligence which in fact caused the damage.

The case has been argued before us on the basis that they are excused as the learned judge held; and if it is to be dealt with on that basis, it follows that the only ground on which the present defendant can be held liable while his co-owners are excused is that he is under a personal disability by reason of his negligence; and this ground, where there has been no wilful default, cannot be maintained.

Are we, then, to give effect to the highly artificial reasoning by which it is suggested that the same acts of the same man are within or without the exception according as he is regarded as owner or as master, and this though the acts were unquestionably done in the discharge of his functions as master only?

It seems to us that it would be simpler and more in accordance with common sense to hold that the negligence which caused the damage was exclusively master's, as distinguished from part owner's, negligence, within the meaning of the exception.

The case of *Jones* v. *Nicholson* (1), above cited, favours this

(1) 10 Ex. 28.

view. There was there no contract by the underwriters to be responsible for a part owner's barratry; their only contract was against that of captain or mariners, and the argument was that, the captain being an owner, he could not commit barratry.

The Court obviously regarded the act done by a captain who was also part owner as an act done by him as captain only, and not as part owner, and therefore as coming within the policy. Again, in *Earle* v. *Rowcroft* (1) it was contended that a captain who was also supercargo, and as such represented the owner, must be taken to have assented as supercargo to his acts as captain, and therefore debarred the owner from claiming in respect of them as barratrous. Lord Ellenborough dealt with this argument by saying that it only required to be stated to be rejected. (2)

The plain common sense of the matter seems to be that the owners, including the defendant, bargained to be excused from the consequence of the negligence within the sphere of his duty of the person—whoever he might be—who should be properly charged with the command of the ship. That person was the defendant, and the loss has arisen by reason of the very negligence which they provided against, namely, negligence in the navigation of the ship. This construction involves no addition of words to those in the bill of lading, which, as they stand, are sufficient and unambiguous.

We have pointed out that the logical result of the plaintiffs' contention, involving as it does the proposition that the acts of the defendant being those of one man are inseparable, and must be deemed to have been done in both capacities, must be that the co-owners are unprotected, and the exception nugatory. There is certainly no reason in common sense for adopting this artificial construction unless we are forced to do so, for, had the same master done the same acts being one of seven persons formed into a limited company and holding the largest interest in it, he would be protected; while, on the proposed construction, if he were a part owner holding only one share, he would be

(1) (1806) 8 East, 126. (2) 8 East, at p. 140.

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liable to the full extent of the damage. The appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendant: *Pritchard & Sons.*

A. M.

1898 *May* 20.

IN THE MATTER OF AN ARBITRATION BETWEEN GEORGE AND THE GOLDSMITHS AND GENERAL BURGLARY INSURANCE ASSOCIATION, LIMITED.

Insurance—Burglary—Loss by Theft—Entry by opening Shop Door—"Actual forcible and violent Entry."

A policy of insurance was expressed to be made "against loss or damage by burglary and housebreaking as hereinafter defined," and witnessed that, if the property, which was jewellery, should be lost by theft following upon actual forcible and violent entry upon the premises wherein the same was situate, the insurers should pay. The jewellery was in a shop, the front door of which was shut but not locked nor bolted, and access could be gained by turning the handle of the door. In the absence of the porter, before the shop was opened for business in the morning, somebody opened the front door, entered the shop, and stole the jewellery.

On a case stated in arbitration:—

Held, that the loss was a loss by theft following upon actual forcible and violent entry, within the meaning of the policy, and the assured was entitled to recover.

AWARD stated in the form of a special case for the opinion of the Court.

A policy of insurance was entered into between Alfred Augustus George, the assured, and the Goldsmiths and General Burglary Insurance Association, Limited. The policy recited that the assured was desirous of effecting an insurance "against loss or damage by burglary and housebreaking as hereinafter defined." After describing the property insured (which was jewellery), the policy continued as follows: "Now this policy witnesseth that if at any time after the date hereof, and during the continuance of this policy, the property above described, or any part thereof, shall be lost by theft following upon actual

forcible and violent entry upon the premises wherein the same is herein stated to be situate, then the Association shall pay or make good to the assured such loss."

The assured was, on March 12, 1897, the owner of a shop and premises, and the stock and property therein contained.

On that day, at 8.30 A.M., the front door of the shop was shut, but was neither locked nor bolted, and access to the shop could be gained by turning the handle of the door.

Soon after 8.30 A.M., in the temporary absence of the porter, who was moving the shutters to the rear of the premises, one or more persons opened the front door, and entered the shop unobserved, and obtained access to the jewellery by forcibly prising off an iron plate, to which a locked padlock was attached. The said person or persons thereupon stole, took, and carried away a quantity of jewellery, part of the stock-in-trade of the assured, together with the iron plate and padlock, and the property had never been recovered.

If the Court should be of opinion that the loss of the property was a loss by theft following upon actual forcible and violent entry upon the premises, within the meaning of the policy, the umpire awarded and determined that the company should pay to the assured the sum of 839*l.*

Joseph Walton, Q.C. (*A. T. Lawrence, Q.C.*, with him), for the assured. The effect of the words in the policy, defining the loss insured against as a loss "by theft following upon actual forcible and violent entry upon the premises," is only to limit the definition of burglary according to the criminal law, so as to exclude the case of a constructive breaking, and to require that there shall be an actual breaking, which is defined in Hale's Pleas of the Crown, p. 552, as follows: "And these acts amount to an actual breaking, viz., opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger." This definition shews that opening the door in the present case amounted to an actual forcible entry, and the use of the word "violent" can make no

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difference, for the amount of force used must be immaterial. The terms of the policy are also satisfied by the breaking and prising off of the iron plate and padlock: Hale's Pleas of the Crown, p. 555; Foster's Crown Cases, p. 108. The assured is therefore entitled to recover 839*l.*, the amount found by the umpire.

Bucknill, Q.C. (*C. L. Attenborough* with him), for the Association. The case does not come within the terms of the policy. The insurance is expressed to be made "against loss or damage by burglary and housebreaking as hereinafter defined," and the definition is contained in the words "lost by theft following upon actual forcible and violent entry upon the premises." These words exclude the act of prising off the plate and padlock: *Rex* v. *Paine*. (1) Some effect must be given to the words "forcible and violent." In their ordinary sense those words imply the use of a material and substantial degree of force, and are not satisfied by the examples of entry in cases of burglary, which have been referred to. The effect of the words of definition in the policy is to exclude from consideration all the decisions on indictments for burglary or housebreaking. It follows that the loss in the present case is not covered by the words of the policy, and the Association is not liable. [He also referred to Russell on Crimes, vol. 2, bk. 3, ch. 1, s. 2, pp. 2–10, 6th ed.; *Stanley* v. *Western Insurance Co.* (2)]

A. T. Lawrence, Q.C., in reply. The words of the definition cannot be read as altogether excluding the effect of the use of the previous words "burglary and housebreaking."

WILLS J. The policy on which the claim is made is, broadly speaking, a policy of insurance against burglary and housebreaking, but it contains a clause stating that the insurance is "against loss or damage by burglary and housebreaking as hereinafter defined," and it goes on to provide that if the property insured "shall be lost by theft following upon actual forcible and violent entry upon the premises," the Association shall pay. In order to decide the question raised we must take

(1) (1834) 7 C. & P. 135. (2) (1868) L. R. 3 Ex. 71.

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the entire description of the loss insured against. It will be convenient to start with the consideration of what would be the appropriate description of burglary and housebreaking, if those words stood alone, and were left untouched by any further definition. Such a description would be, breaking and entering premises for the purpose of committing a felony; that is a complete description. In this policy the word "breaking" is omitted, and for "breaking and entering" is substituted "actual forcible and violent entry upon the premises," and instead of "for the purpose of committing a felony," is inserted the phrase that the property "shall be lost by theft following upon" such entry as therein described, the effect of which is that a theft must follow the entry in order to make the definition applicable. The expression "actual forcible and violent entry" gets rid of any question of liability where the breaking is only constructive, but can it mean anything different from forcible breaking and entering? In the old indictments the breaking and entering was described as having been done with force and arms, and feloniously, and, in cases of burglary as distinguished from housebreaking, burglariously. Therefore what is described in the policy is a forcible entry followed by theft, and this is really the same as an ordinary case of housebreaking, except that "followed by theft" is substituted for "with intent to commit a felony." The word "violently" is equivalent to "vi," by force, and in Webster's Dictionary (edition of 1882) the first synonyms given for the word "violent" are, "moving or acting with physical strength; urged or impelled by force." Suppose an entry were made into a dwelling-house by opening a window left unfastened, can it be that such an entry would not come within this policy? One of the commonest forms of burglary is where the catch of the window is pushed open with a knife, an operation very often requiring nothing approaching to what would popularly be called violence. It seems impossible to suppose that any policy against burglary can have been meant to exclude such a case. Or take the case where a burglar or housebreaker opens a door by means of a skeleton-key; could it be said in such a case that the policy would not apply? Illustrations such as these are

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valuable, as shewing that the expression "violent" may be satisfied by some act not requiring any great degree of force. I think this clause in the policy amounts to an inartistic description of ordinary housebreaking or burglary, with certain qualifications not touching this case. As we can decide the case on the ground which I have stated, it is unnecessary to enter upon the question as to the effect of prising off the iron plate with the padlock attached to the inner structure, so I express no opinion as to that. I am of opinion that the claim of the assured is well founded, and he is entitled to recover.

KENNEDY J. I am of the same opinion. This is a policy expressed to be against loss by burglary and housebreaking, and, for my own part, seeing that those words are fairly well understood, I think the policy cannot be read so as to deprive the assured of protection in the way contended for by the respondents. It is true the policy does not say burglary and housebreaking simpliciter, but "as hereinafter defined." What liability which might otherwise be incurred does the Association wish thereby to be protected against? Liability, I think, in the case of a constructive breaking. They wish to be liable as insurers only in cases where the premises are closed, and some one comes into them without the licence of the owner, breaking or removing the obstruction to his entry, and steals. The words "actual forcible and violent entry" are used, instead of breaking and entering, in order to exclude a case of constructive breaking. Provided there is no licence from the owner and there is a real closing of the premises by some physical obstruction, there is in my view, according to the intention of this policy, upon the part of the person who enters, an actual forcible and violent entry; the premises are entered forcibly and violently. In the present case there was a closed door. I agree with Wills J. that the use of the word "violent" adds nothing to that which was already expressed by "forcible." I would further say that, from a business point of view, it would be most inconvenient to have to argue in a claim upon a policy of this sort as to what amounts to force and violence; it would be most unsatisfactory and difficult to have to discuss such a

question as the degree of force or violence used or needful to be used by the robber to effect his entrance.

Judgment for the assured.

Solicitor for the assured: *Stanley J. Attenborough.*
Solicitors for the Association: *Attenborough & Son.*

P. B. H.

FARMER & CO., LIMITED, APPELLANTS *v.* THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

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May 13.

Revenue—Stamp—Agreement for Sale—Equitable Estate—Property locally situate out of the United Kingdom—Purchase in England of Equity of Redemption—Ad Valorem Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1—*Trust Property Act of* 1862, *New South Wales* (26 *Vict. No.* 12), *s.* 25.

By the Stamp Act, 1891, s. 59, sub-s. 1, "Any contract or agreement made in England under seal, or under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except property locally situate out of the United Kingdom," is charged with ad valorem duty.

By the New South Wales Trust Property Act of 1862, s. 25, "All mortgages of real or personal estate shall hereafter be deemed at law, as now in equity, pledges only of the property thereby mortgaged; and nothing in any such mortgage shall prevent the title of any mortgagor, or person claiming and being in possession, from being deemed a good title at law, subject to such pledge, as against all persons other than the mortgagee and those claiming under him."

The appellants entered into a written agreement in England to purchase property in New South Wales, subject to a mortgage.

On a case stated by the Commissioners of Inland Revenue, pursuant to s. 13 of the Stamp Act, 1891:—

Held, that the words of exception in the Stamp Act, 1891, s. 59, sub-s. 1, do not apply to an equitable estate or interest in property locally situate out of the United Kingdom, and therefore the general words, "any equitable estate or interest in any property whatsoever," apply, and ad valorem duty is payable on an agreement made in England for the purchase of such an estate:

Held, also, that the New South Wales Trust Property Act does not confer the legal estate in mortgaged property on the mortgagor:

Held, therefore, that ad valorem duty was payable on the purchase by the appellants of the equity of redemption.

CASE stated by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

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An instrument was presented on behalf of Farmer & Co., Limited, the appellants, to the Commissioners of Inland Revenue, under the Stamp Act, 1891, s. 12, for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

The instrument was under the hands of Sir William Farmer and John Pope, and under the seal of the appellants. It was dated February 8, 1897, and was made between Sir William Farmer and John Pope of the one part, and the appellants of the other part, and by the agreement the parties of the one part agreed to sell to the appellants the properties referred to in the schedule. It was made and executed in England, and was admitted by the appellants to be liable to duty according to the assessment of the commissioners, if the Court should be of opinion, (1.) that the property described in the schedule to the agreement, and being the premises therein numbered 1 and 2, was an equitable estate or interest in property, within the meaning of the Stamp Act, 1891, s. 59, sub-s. 1, and, (2.) that the exception in favour of estates or interests in lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, does not apply to equitable interests in such property.

The premises in the schedule numbered 1 and 2 consisted of certain freehold properties in Sydney, New South Wales. The price which the appellants apportioned to the premises was 98,000*l.*

The premises firstly described in the schedule were at the date of the agreement subject to a mortgage to secure 40,000*l.* with interest at 5 per cent., and the premises secondly described were subject to a mortgage to secure 18,000*l.* with interest at 5 per cent., and by the agreement the premises were sold subject to these mortgages. The indentures of mortgage were executed in Sydney.

The law in force in New South Wales, other than the colonial statutory law, is the law of England. The appellants contended that by virtue of a provision contained in s. 25 of the Colonial statute 26 Vict. No. 12 (1), the mortgagor of the property,

(1) See the section set out, post, p. 144, note (1).

notwithstanding the mortgage, had a legal and not an equitable interest in the property, and, consequently, that the agreement for sale of the premises numbered 1 and 2 was the sale of a legal interest in land, and not a sale of any equitable estate or interest in any property, within the meaning of the Stamp Act, 1891, s. 59.

They further contended that an equitable interest in land situate abroad was not an equitable interest in any property whatsoever, within the meaning of the Stamp Act, 1891, s. 59.

The commissioners were of opinion that, notwithstanding the statutory provision, the interests agreed to be sold in the properties numbered 1 and 2 were equitable estates or interests in the property, and were within the words of the Stamp Act, 1891, s. 59. They accordingly held that the agreement was liable to ad valorem conveyance duty in respect of the properties, and assessed the duty at 490*l.*, being 10*s.* per cent. on 98,000*l.*, the apportioned amount of the total consideration applicable thereto.

The question for the opinion of the Court was, whether the instrument was chargeable with the duty of 490*l.* in respect of the properties numbered 1 and 2 in the schedule to the instrument.

Scrutton, for the appellants. The agreement under which the appellants have purchased is a contract or agreement for the sale of an estate or interest in property locally situate out of the United Kingdom, within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891 (1), and the exception in that section of property locally situate out of the United Kingdom applies to equitable, as well as to legal, estates or interests, so that, if the interest passing under this contract is equitable, it is taken out of the

(1) 54 & 55 Vict. c. 39. By s. 59, sub-s. 1, "Any contract or agreement made in England . . . . under seal, or under hand only, ... for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, ... shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

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words in the section, "any equitable estate or interest in any property whatsoever." An equity of redemption is clearly either an estate or an interest: Fisher on Mortgages, s. 1374. But the effect of the colonial statute (1) referred to in the case is, that by the law of New South Wales the mortgagor of property locally situate in that colony, or a purchaser of the mortgagor's interest, is to be deemed to have the legal estate, at least as against all persons except the mortgagee. The statute prevents any person other than the mortgagee from putting forward any claim against the mortgagor, which is based on the assumption that the mortgagor has not the legal estate in the property. This view is supported by two decisions of the Supreme Court of New South Wales, *Norman* v. *Peck* (2) and *Re Fergusson.* (3)

The Solicitor-General (*Sir Robert Finlay, Q.C.*), (*Danckwerts* with him), for the respondents. The effect of the New South Wales statute is not to convert the equitable title of the mortgagor into a legal title; his title is only to be "deemed a good title at law, subject to the pledge, as against all persons other than the mortgagee and those claiming under him." The object is to enable the mortgagor to enforce claims at law in respect of the property, without being under the necessity of joining the mortgagee. The statute does very much the same as is done in this country by the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 5. The judgments in *Re Fergusson* (3) support this view rather than the contention of the appellants. The Court in that case interpreted the statute correctly. The appellants therefore have purchased an equitable estate or interest, and the ad valorem duty is payable.

(1) By the Trust Property Act of 1862 (Statutes of New South Wales, 26 Vict. No. 12), s. 25, "All mortgages of real or personal estate shall hereafter be deemed at law, as now in equity, pledges only of the property thereby mortgaged; and nothing in any such mortgage shall prevent the title of any mortgagor or person claiming and being in possession from being deemed a good title at law, subject to such pledge, as against all persons other than the mortgagee and those claiming under him. Provided that nothing in this enactment contained shall interfere with or prejudice the legal rights and remedies of mortgagees and those claiming under them for the preservation and enforcement of their securities."

(2) (1876) 3 N. S. W. L. R. 42.

(3) (1882) 3 N. S. W. L. R. 43.

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Scrutton, in reply. The effect of the respondents' contention is to set up that the appellants have not the legal estate, which can only be done by the mortgagee or those claiming under him.

WRIGHT J. The question depends upon two enactments, first, the Stamp Act, 1891, s. 59, which provides in substance that any contract made in this country for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, except lands situate out of the United Kingdom, shall be chargeable with stamp duty, as if it were an actual conveyance.

The first point to determine is, whether the exception of lands out of the United Kingdom extends to equitable estates or interests in property, as well as to the second branch of the section. I think it does not. Grammatically considered, it seems to me that the section divides itself, after the words "sale of any equitable estate or interest in any property whatsoever," and that the exception of lands out of the United Kingdom belongs only to the other branch. Otherwise the words, "of any equitable estate or interest in any property whatsoever," would be wholly unnecessary, and the section would mean the same without them. Then, was the contract in this case a contract for the sale of an equitable estate or interest in any property whatsoever? If it was, it seems to me that the Solicitor-General is right in saying that it is immaterial for the present purpose whether it is or is not also within the second branch, because the exclusion of the second branch does not prevent the words of the first branch from applying. The second branch may apply to some things which are not included in the first branch, and I do not think that it can be said to cut down the first branch, which is perfectly general in its terms. Then is this the sale of an equitable estate or interest? By English law it would be the sale of an equitable estate or interest in the land in question.

Then it is said that that is cut down by the New South Wales statute. I do not know what the New South Wales statute means, apart from the decisions upon it which have

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been reported, but those decisions must guide us in the construction of the New South Wales Act, because the question of what is the title to realty in New South Wales must depend on New South Wales law. The case of *Re Fergusson* (1) seems to me to be a decision that, as regards title in devolution, the section of the New South Wales Act has not made any difference, that it has only made, as regards the remedies of the mortgagor against third parties, a provision very similar to that which, as has been pointed out, has been made in this country by the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 5, and which in fact existed for all equitable purposes long before, although it did not exist for purposes of ejectment and trespass in some cases. I think we must follow the latest New South Wales decision, and it seems to be in accordance with good sense.

PHILLIMORE J. I am of the same opinion. I think that the first passage in s. 59, sub-s. 1, of the Stamp Act, 1891, affixes a duty upon an agreement for the sale of any equitable estate or interest in any property whatsoever, and that the next passage does not detract from that, but adds to it. The words are "or for the sale of any estate or interest in any property except lands . . . . out of the United Kingdom, or goods," &c. I do not think that exception is intended to relate to the first passage, and I think that the perfectly specific words of the first passage impose a duty, which the second passage does not take away.

Then, with regard to the question whether this is an equitable estate or interest, I do not know for certain which way I should have been inclined to decide, if I had not been assisted by the construction which the Court in New South Wales has put upon its own statute. It would be quite possible to take either view of the statute. Certainly I cannot say that I disagree with the view which I have very little doubt was taken by the New South Wales Court in the second of the two cases referred to: *Re Fergusson*. (1) I do not say the effect is precisely to make the New South Wales legislation the same as

(1) 3 N. S. W. L. R. 43.

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Phillimore J.

the English legislation under the Judicature Act, but it is obvious that it is very nearly the same, according to the construction put upon the statute in *Re Fergusson*. (1) In this case it is the sale of an equitable interest that has been effected. Possibly and probably to that equitable interest some legal rights have been appended by the colonial legislation. None the less is it a sale of an equitable interest, and an equitable interest only.

Appeal dismissed.

Solicitors for appellants: *Shepheards.*

Solicitor for respondents: *F. C. Gore, the Solicitor of Inland Revenue.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.

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April 30.

ATTORNEY-GENERAL *v.* BEECH AND ANOTHER.

Revenue—Estate Duty—Life Estate—Surrender to Remainderman—Merger—"Interest ceasing on Death of Deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*).

By s. 1 of the Finance Act, 1894, estate duty is made payable on the principal value of all property, real or personal, settled or not settled, which passes on the death of any person dying after the commencement of that part of the Act. By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased includes "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

The tenant for life of certain property comprised in a marriage settlement, with a power of appointment, appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest in the settled property to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son:—

Held that, upon the death of the tenant for life, estate duty did not become payable in respect of the property surrendered to the son, as property passing on her death within the meaning of the Finance Act, 1894.

Judgment of the Divisional Court, [1897] 2 Q. B. 535, reversed.

APPEAL from a judgment of a Divisional Court, reported [1897] 2 Q. B. 535.

(1) 3 N. S. W. L. R. 43.

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ATTORNEY-GENERAL v. BEECH.

Eliza Beech, who had a life interest in certain trust funds, over which she had a power of appointment, appointed the funds, subject to her life interest therein, to her son Howard Beech, and subsequently surrendered her life interest in the funds to him. She died one year and eight months after such surrender.

An information by the Attorney-General claimed that upon the death of Mrs. Beech estate duty, under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894 (1), became payable upon the principal value of the trust property so surrendered, as property passing on her death within the meaning of the Act.

The Divisional Court (Pollock B. and Ridley J.) gave judgment for the Crown. (2)

The defendants appealed.

March 29. *Cozens-Hardy, Q.C.*, and *Levett, Q.C.* (with them *W. M. Spence* and *Austen-Cartmell*), for the defendants. Before the death of his mother, Harold Beech was absolutely entitled to the property and no one else was interested. Had he died the whole would have been treated as passing on his death. There had been a merger of the life estate: *In re Radcliffe, Radcliffe* v. *Bewes*. (3) There was no cesser of any interest on the death of Mrs. Beech, nor does the son come within the description of another person who had an interest ceasing on the death of the deceased.

[They also cited *Earl Cowley's Estate*. (4)]

The *Attorney-General* (*Sir R. E. Webster, Q.C.*) and *Sir R. T. Reid, Q.C.* (with them *Vaughan Hawkins*), for the Crown. The defendants can only succeed by praying in aid the doctrine of merger, but if surrender to the remainderman takes

(1) By 57 & 58 Vict. c. 30, s. 1, in the case of every person dying after the commencement of that part of the Act, estate duty is made payable upon the principal value of all property, real or personal, settled or not settled, "which passes on the death of such person."

By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased is to be deemed to include "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest. . . ."

(2) [1897] 2 Q. B. 535.

(3) [1892] 1 Ch. 227.

(4) [1898] 1 Q. B. 355.

the case out of the Act, successive surrenders of that kind would defeat the object of the Act. The limitation of twelve months before the death of a donor, applicable under the Customs and Inland Revenue Acts, 1881 and 1889, to a gift inter vivos, does not apply to the gift of a life estate which comes to an end on the death of the donor, so that s. 2, sub-s. 1 (*c*), is not applicable; and, if the defendants are right, a surrender on a death-bed would defeat the Act. The assignment divested the tenant for life of all interest in the property, but it vested an interest in that life estate in the remainderman as much as if the life estate had been assigned to trustees in trust for him.

Cozens-Hardy, Q.C., in reply.

Cur. adv. vult.

April 30. A. L. SMITH L.J. read the following judgment:— The question in this appeal is whether, when a tenant for life, more than twelve months before his death absolutely and bonâ fide, surrenders his life interest to the remainderman, this property is nevertheless, upon the death of the tenant for life, liable to estate duty under the Finance Act, 1894.

The facts giving rise to the question are extremely short.

By deed bearing date December 21, 1886, Eliza Beech, who had a life interest in certain trust funds, over which she had a power of appointment, appointed the funds, subject to her life interest therein, to the remainderman, her son Howard Beech.

In the year 1894 Eliza Beech was desirous of surrending her life interest in the trust funds for the benefit of her son Howard Beech, and by deed bearing date December 18, 1894, she surrendered her life interest in these funds "to the end and intent that such life interest might merge in the interest in remainder of her son Howard Beech, and that accordingly William Beech and Howard Beech as trustees might thenceforth hold the said trust funds in trust for the said Howard Beech, his heirs, executors, administrators, and assigns, to be disposed of as he or they should direct."

Upon the surrender of this life interest to Howard Beech he became absolute owner of these funds.

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Eliza Beech died upon August 27, 1896. These are the facts. The real point, in my judgment, for determination is, When did the life interest of Eliza Beech pass? Did it pass to her son, the remainderman, at the date of the surrender—namely, upon December 18, 1894—or did it pass to him at the death of Mrs. Beech upon August 27, 1896, i.e., twenty months after the surrender? Lengthened arguments have been addressed to us by the Attorney-General and Sir Robert Reid as to what was the intention of the Legislature when it passed the Act of 1894; but as to this I cannot do better than quote the words of the Lord Chancellor (Lord Halsbury) in the House of Lords when dealing with a similar argument and addressed to the House upon a taxing Act in the case of *Tennant* v. *Smith.* (1) The Lord Chancellor said: "This is an income-tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed' I mean what is the intention of the Act as expressed in its provisions, because in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said in *In re Micklethwait* (2): 'It is a well-established rule that the subject is not to be taxed without clear words for that purpose; and also, that every Act of Parliament must be read according to the natural construction of its words.'"

Now what is it that the Finance Act by the very words of the Act levies a duty upon? The governing words of the Act will be found clearly set out in ss. 1, 2. Sect. 1 enacts that "in the case of every person dying after the commencement of this part

(1) [1892] A. C. 150, at p. 154. (2) (1855) 11 Ex. 452, at p. 456.

of the Act, there shall . . . . be levied and paid upon the principal value . . . . of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called estate duty"; and s. 2, sub-s. 1, follows up s. 1 and enacts that "property passing on the death of the deceased shall be deemed to include the following property." What this is I will deal with hereafter. The Act for the first time imposed a duty upon all real or personal property settled or not settled which passes or is deemed to pass upon death. The time at which by the Act the duty is imposed is the moment of death; the property upon which the duty is imposed is the property which passes or is deemed to pass upon death. If no property passes or is deemed to pass upon death no estate duty is leviable. If it be leviable, then the duty imposed is upon the principal value of the property which passes or is deemed to pass upon death. This is what we decided in *Earl Cowley's Estate* (1), though in that case we held that as the life estate of the second Earl had been kept alive until his death, and was then subsisting, it was property which was deemed to pass within s. 2, sub-s. 1 (*b*), of the Act upon the death of the second Earl—a very different case from the present.

I now come to s. 2, sub-s. 1. It enacts that "property passing on the death of the deceased shall be deemed to include . . . . (*a*) property of which the deceased was at the time of his death competent to dispose; (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." The present case clearly does not fall within s. 2, sub-s. 1 (*a*), for the owner of the life interest at the time of her death was not competent to dispose of it for the simple reason that she had absolutely disposed of it more than one year and eight months before her death. Nor does it fall within s. 2, sub-s. 1 (*b*), for the owner of the life interest had already disposed of it one year and eight months before her death, and had no interest ceasing on her death, nor had the remainderman any interest ceasing on her death, for at the date of the death of the owner of the life interest the remainder-

(1) [1898] 1 Q. B. 355.

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man had been absolutely entitled to it for more than twenty months before. This life interest had been extinguished and annihilated long before the death of the owner of the life interest, upon which event it is that the estate duty attaches upon the property which then passes. To no extent whatever did a benefit accrue or arise by cesser of the life interest upon the death of the owner of that interest, either to her or to the remainderman, or to any other person. In the face, however, of the clear words of the Act, divers arguments were addressed to us by learned counsel for the Crown. It was argued that as the owner of the life interest had had at one time a life interest in the property it came within s. 2, sub-s. 1 (*b*); but I would point out that this is not so, for the words are, not "had had," as the Crown contended, but on the contrary are, "had an interest ceasing upon the death of the deceased," and are not "has had an interest which had ceased before death." Take, for instance, the case of a remainderman dying in the lifetime of the surrenderor after an absolute surrender to him of a life interest: what duty would have to be paid upon the property which passed upon his death—that is, upon death of the surrenderee, the remainderman? It is obvious to me that duty would have to be paid upon the principal value of the property which passed at the death of the remainderman; and yet if the Crown be right another duty would become payable upon the subsequent death of the owner of the life interest, for, upon the hypothesis which the Crown contends for, the life interest passes in such circumstances upon the death of the owner of the life interest. This appears to me, with submission, to be absurd.

Another argument put forward by the Crown was that s. 2, sub-s. 1 (*b*), deals with settlements—and so it does; but where in the sub-section, or, indeed, in any other section, are to be found words shewing that property which is non-existent passes or is deemed to pass upon death, and is subject to estate duty? Sects. 5 and 7 were referred to, but in my opinion they shew nothing of the kind. Again, the Crown argued that if its contention were not correct, after the words "property in which the deceased or any other person" in s. 2, sub-s. 1 (*b*),

must be added the words "other than the remainderman," for if they are not inserted the words "or other person" embrace the remainderman. Assume they do; but how does this shew that the life interest, which has become extinct by the surrender, is liable to estate duty?

My brother Chitty during the argument answered another suggestion made on behalf of the Crown, which was that if the Crown were not right in its contention, the case of a surrender of a life interest to a remainderman was the only case in which estate duty would not become payable upon the death of the owner of the life interest. My brother pointed out that this was not so, and he put the case of the cesser of a life interest with a gift over in fee upon the happening of an event which had happened, and the owner of the life interest not dying till years afterwards. Would estate duty become payable upon the death of this owner of this defunct life interest? I say not; but upon the death of the owner in fee it would be that the Crown would get the duty. The real truth of this case is, that after the surrender by the owner of the life interest to the remainderman, it having taken place more than twelve months before the death of such owner, her death, so far as estate duty is concerned, is a wholly immaterial matter, for her life estate had then ceased to exist, and nothing passed at her death: see *In re Radcliffe, Radcliffe* v. *Bewes*. (1) The Attorney-General, to use his own expression, stated that if we decided against him we should knock the bottom out of the Finance Act, for he argued that our judgment would permit any tenant for life upon his death-bed to surrender his life estate to the remainderman and thus defeat the duty. He argued that s. 2, sub-s. 1 (*c*), of the Finance Act, which relates to gifts inter vivos less than twelve months before death, and which incorporates s. 2 of the 44 Vict. c. 12, as amended by 52 Vict. c. 7, s. 11, sub-s. 1, and which is amended by s. 2, sub-s. 1 (*c*), of the Finance Act, did not apply to this case.

That s. 2, sub-s. 1 (*c*), is a very remarkable piece of legislation no one can deny, and if what the Attorney-General says is the effect of it, the Legislature by the circuitous route it has

(1) [1892] 1 Ch. 227.

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adopted has obviously failed to carry out its object; but if this be so, all I can say is, so much the worse for the Crown. The true construction of this composite section is wholly immaterial to the present case, and I give no opinion as to its true construction, though the argument upon it struck me as remarkable, coming as it did from learned counsel for the Crown.

For the reasons above I think the Crown is wrong, and that Eliza Beech's property in the trust funds, which consisted of a life interest therein, and which came to an end twenty months before her death, is not liable to estate duty upon her death as contended for by the Crown, and this appeal must therefore be allowed.

CHITTY L.J. read the following judgment:—I am of the same opinion. Upon the execution of the deed of December 18, 1894, the appellant, Howard Beech, became absolutely entitled in equity in possession to the trust property, upon the principal value whereof the estate duty is claimed by the information. The effect of the deed was to merge his mother's life interest in the immediate reversion then vested in him. The life interest was finally extinguished and ceased to exist. Thenceforth he was the sole owner of the entire beneficial interest in the property. He had all the rights of a beneficial owner. He could have sold or assigned the property, or mortgaged it, or otherwise disposed of it as he thought fit. He could have required his co-trustee to make it over to himself or his assigns. The merger of the life interest was as complete as it would have been if the property had been land and the estates legal. All these propositions are incontrovertible. They are the result of the simple application of an ordinary and well-established rule of equity to the facts of the case.

The ground being thus cleared, the question, as it appears to me, is narrowed down to this: Has the Finance Act, 1894, Part I. (the only part with which we have to deal), kept alive the life interest of Mrs. Beech for the purposes of the Act so as to render the property liable to estate duty on her death, notwithstanding the merger?

It is unquestionably within the competence of Parliament when imposing a tax to modify or abrogate for the purpose of the Act any rule of law or equity which otherwise would be applicable to the subject-matter. Whether it has done so or not must always be a question of the true construction of the particular statute under consideration. The right, and indeed the only, method of interpretation is to ascertain the intention of the Legislature from the language and provisions of the Act itself. In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail, except in so far as the statute shews that they are to be disregarded; and the burden of shewing that they are to be disregarded rests upon those who seek to maintain that proposition. It is incumbent on the Crown when claiming the tax to make out affirmatively that the case falls within the statute. The principles applicable to the interpretation of a taxing Act are laid down by the Lord Chancellor in the passage already cited. You must see that the tax is expressly imposed; the subject is not to be taxed without clear words, and the Act, like every other Act, must be read according to the natural construction of the words.

In construing this particular Act, I am unable to derive any assistance from the authorities or the dicta on the Succession Duty Acts. The two Acts are framed on entirely different lines.

The scheme of the Finance Act, Part I., is to be found in the 1st section, which is more fully developed and explained in the subsequent sections, the most important of which, for the present purposes, is the 2nd section. The effect of these two sections is to impose the tax on property which passes or is deemed to pass on death. Stated simply, but with sufficient accuracy for the present purposes, the 1st section runs thus: "In the case of every person dying after August 1, 1894, there shall be levied and paid upon the principal value of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called 'estate duty' at the graduated rates after mentioned." For the duty to attach under this section, it is essential that there be a passing of

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property on the death of the person so dying. In my judgment, it is clear that the case does not fall within this section. No property passed on Mrs. Beech's death. Her life interest had passed more than a year before she died. The property remained unaffected by her death. If the appellant, Howard Beech, had died in her lifetime, the property would have passed on his death, and the duty would have been leviable. The fact that she was then alive would have been wholly immaterial. Her subsequent death would have been equally immaterial. Yet, to be consistent on this section, it must be said for the Crown that a new or further duty would have been payable on her subsequent death.

The claim for the duty is rested substantially on the 2nd section. I pass over sub-s. 1 (*a*), which has already been sufficiently dealt with by A. L. Smith L.J., and go to sub-s. 1 (*b*). The effect of it is as follows: Property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. Mrs. Beech had formerly a life interest in the property, but it had ceased more than a year before her death. The words are, "ceasing on the death of the deceased." They import, according to their grammatical and natural meaning, that the interest ceases presently on the death. The argument for the Crown alters the words. It attempts to read the words as if they included the case of having previously had an interest which had ceased upon the death. In my opinion, the interest which ceases must be an interest which ceases on the death. I agree with what Rigby L.J. said in *Earl Cowley's Estate* (1), where the interest is a life interest it need not be a life interest in the deceased: the deceased may have been merely a cestui que vie, the beneficial interest being vested in some other person. The sub-section is not confined to life interests: it would embrace any other case of an interest ceasing on the death. But confining myself for the moment and for the sake of clearness to a life interest, it appears to me that the argument for the Crown

(1) [1898] 1 Q. B. at pp. 375, 376.

requires the insertion of words to the effect that a life interest for the purpose of the sub-section shall be deemed to continue down to the death of the deceased, notwithstanding it has been previously determined by merger. I cannot find any such words, nor words from which any such implication can be reasonably said to arise. Certainly there are no clear words to that effect.

During the argument I put a case to the counsel for the Crown on which I received no clear or satisfactory answer. Supposing a life interest is limited to a man for his life subject to a condition of cesser if he shall attempt to aliene, and he does attempt to aliene, whereby his life interest ceases on that attempt; or supposing property to be limited to a widow subject to a provision if she marries again, and she does marry again, whereby her life interest ceases on her second marriage: do these cases fall within the sub-section? In my opinion, they clearly would not. Much was said upon opening the door to evasion. Would these be cases of evasion? Certainly not. Indeed, the whole argument on evasion of the Act is fallacious. The case either falls within the Act or it does not. If it does not, there is no such thing as an evasion. If a tax is imposed on using a crest or coat-of-arms and a man who has previously used them ceases to use them in order to be free from the tax, there is no evasion of the Act in any sense of the term legitimately used.

I now ask what is the difference between the two hypothetical cases I have put and the case before us. I can see none. In the case before us the general law of merger, whereby the life interest ceased, was brought into operation by the lawful act of the parties. In the hypothetical cases the life interests ceased by the acts of the parties bringing into operation a limitation of cesser to which the law gives effect.

Turning back to the sub-section, I will deal briefly with the words "or any other person," on which great stress was laid in the argument for the Crown. They carry the case of the deceased being a mere cestui que vie. Restricting myself again to the case of a life interest, but merely for the sake of clearness, they include a life interest originally vested in the deceased

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which has been assigned or transferred to some other person and is still subsisting at the death. They would include other like cases; but they do not apply where the interest has ceased before the death.

The words remaining to be considered are, "to the extent to which a benefit accrues or arises on the death of the deceased." They were dealt with by the Court in *Earl Cowley's Estate* (1), and more particularly by Rigby L.J. I agree with what he said in his judgment. (2) He said that the words did not involve any departure from the principle that the Act takes no notice of successions; and that they "only limit the operation of the word 'ceasing' by confining it to cases where something passes and to the extent to which anything does pass." And, again, "they are there used" "as a measure of the extent to which the property in which the interest ceases is to be deemed to pass, and s. 7, sub-s. 7, only shews the way of applying that measure." He afterwards dealt with s. 7. I think it unnecessary to add anything on that section.

In support of their main contention, counsel for the appellants referred to s. 2, sub-s. 1 (*c*), and contended that if the merger had taken place within a year before Mrs. Beech's death the gift of her life interest would have brought the case within the Act. In my opinion, their main contention did not require this support. For the Crown, however, it was contended that a gift of the life interest would not have fallen within the reach of the statutes mentioned in this complicated section. Legislation by reference to other statutes which are at the same time altered by the enacting statute is a risky method, and sometimes fails in accomplishing the object in view. I will assume that the counsel for the Crown are right in their contention, but without expressing any opinion one way or the other on the point. On this assumption the result is simply this. The Legislature contemplated that recourse would be had to methods of attempting to escape from the tax, and closed the door against some of these attempts, but left it open where there was a gift of a life interest in the deceased made more than twelve months before the death. In other

(1) [1898] 1 Q. B. 355. (2) [1898] 1 Q. B. at pp. 376, 377.

words, the Legislature (whether intentionally or not it is beyond our province to inquire) has failed or omitted to hit that particular case.

I have dealt only with the main points argued for the Crown. There were some further points raised; but, in my opinion, they do not affect the real question, and, with all due respect to the counsel who raised them, I think it unnecessary to notice them in detail.

In the judgments delivered in the Divisional Court some observations were made on conveyancers and the rules of conveyancing. I am unable to see the bearing of those observations. Conveyancers did not invent the rules of merger either at law or in equity, nor are they responsible for them. Their function is to understand the doctrine of merger, and to apply it practically where it is applicable.

A. L. SMITH L.J. Collins L.J. concurs in these judgments.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *W. Carpenter & Sons.*

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1898
April 27.

[IN THE COURT OF APPEAL.]

CHAPLIN *v.* PUTTICK AND ANOTHER. LAING, CLAIMANT.

Practice—Commission—Subject-matter of Action—Sending out of Jurisdiction for Identification—Order XXXVII., *r.* 5; *Order* L., *r.* 3.

Where witnesses are to be examined on commission out of the jurisdiction of the Court, an order may be made that the subject-matter of the action shall be sent out of the jurisdiction for the purpose of identification by the witnesses.

APPEAL from an order of a judge at chambers.

The plaintiff brought an action against the defendants to recover possession of a stamp album that had been deposited with them by the claimant, and an interpleader order was made between the plaintiff and Laing, the claimants. The case set up by the plaintiff was that the album had been stolen from him at Johannesburg, in the Transvaal, and he obtained an order to examine witnesses at that place on commission. He also asked for an order that the album should be sent out to Johannesburg under proper custody, in order that it might be produced to the witnesses for the purpose of identification. Grantham J. made an order to that effect, against which the claimant appealed.

George Blackwell, for the claimant. There is no power to order the property in dispute to be sent out of the jurisdiction: *Leader* v. *Smyth*. (1) This is not the case of documents in the cause, but of the subject-matter of the action, and there is no statutory authority which sanctions the order that has been made. Order XXXVII., r. 5 (2), only applies to the taking of depositions. The plaintiff's claim is that the album was stolen

(1) (1892) 8 Times L. R. 612.

(2) Order XXXVII., r. 5: "The Court or a judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the Court or judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such depositions in evidence therein on such terms, if any, as the Court or a judge may direct."

from him at Johannesburg, and if it is sent there by the Court a conflict of jurisdiction may arise. Such a consideration shews that any authority of the Court under Order XXXVII., r. 5, should only be exercised, in this case, within the jurisdiction. The same considerations apply to inspection under Order L., r. 3 (1), which can only be ordered within the jurisdiction. [He cited *Portarlington* v. *Soulby* (2); *Bushby* v. *Munday*. (3)]

Hansell. There has been an order for a commission for the examination of witnesses at Johannesburg. The whole object of the commission is to obtain evidence as to the identity of the album, and that will be defeated unless the witnesses can examine it when they give evidence. The words of either Order XXXVII., r. 5, or Order L., r. 3, are wide enough to cover the order made so as to enable the album to be produced at Johannesburg to the witnesses.

Colam, appeared for the defendants.

George Blackwell, in reply.

A. L. SMITH L.J. I think the learned judge arrived at a right conclusion in this case, and had jurisdiction to make the order appealed from. I say at once that if there is not jurisdiction it would be a lamentable thing for the parties. The claimant's case is that he bought the album in London, and the plaintiff's case is that it was stolen from him at Johannesburg. He has brought an action for conversion against the persons in whose custody the book is, and has obtained an order to examine witnesses at Johannesburg, where all his witnesses are. It is absolutely necessary that if the evidence to be taken on

(1) Order L., r. 3: "It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

(2) (1834) 3 My. & K. 104.

(3) (1821) 5 Madd. 297.

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commission is to be of any value, the book should be produced to the witnesses for identification, and that can only be done by sending it to Johannesburg. The question is whether there is jurisdiction to make an order that this shall be done. In my opinion such an order can be made either under Order XXXVII., r. 5, or possibly under Order L., r. 3. By the former order power is given, where it shall appear necessary for the purposes of justice, to make "any order for the examination upon oath before the Court or judge or any officer of the Court, or any other person, and at any place," of any witness or person. It is said that this power must be executed within the four seas; but I do not agree with this contention. The words "make any order" are perfectly general, and do not warrant the imposition of such a limitation, and I think they warrant the making of the order appealed from, which is certainly necessary for the purposes of justice.

Order L., r. 3, relates, among other things, to the inspection of property the subject of the action, and, omitting such parts as do not apply to this matter, it makes it lawful to order the inspection of any property being the subject of the cause or matter upon such terms as may be just. I do not see why under this order a judge should not say that, to meet the ends of justice, the subject-matter of this action should be inspected at the only place where its inspection would be of any use, though it is not as clear as it is in the case of Order XXXVII., r. 5, that the inspection can be ordered to be made out of the jurisdiction.

As to the case of *Leader* v. *Smyth* (1), I cannot read it without seeing that if Mathew J. had had his way he would have held that there was jurisdiction to make the order asked for, but that, sitting in a court of co-ordinate jurisdiction, he did not feel justified in carrying out his own view.

If it is necessary for the decision of this case to overrule *Leader* v. *Smyth* (1), I am prepared to do so.

CHITTY L.J. I am of the same opinion. There has been no appeal from the order to examine witnesses on commission,

(1) 8 Times L. R. 612.

and unless this order is upheld the commission will be ineffective. The album is within the jurisdiction of the Court, and the order is that it shall be sent to the British consul at Johannesburg and ultimately returned to its present custody. To my mind, it would be strange if there were no jurisdiction in the Court to make such an order. On general grounds it appears to me that it is a right and proper order to make.

As to Order XXXVII., r. 5, I think the construction put upon it by the Lord Justice is the correct one. The order which enables the proposed witnesses to identify the album seems to me to be a necessary supplement to the order for a commission. As to Order L., r. 3, I do not see why the power to order inspection should be limited to ordering it within the jurisdiction where, as in cases under Order XXXVII., r. 5, the question is what is necessary for the purposes of justice.

As to the case of *Leader* v. *Smyth* (1), I prefer what I believe to have been the unexpressed opinion of Mathew J. to the opinion in which he concurred.

Appeal dismissed.

Solicitor for claimant: *R. G. Porteous.*
Solicitor for plaintiff: *H. H. Fanshawe.*
Solicitors for defendants: *Stock & Slater.*

(1) 8 Times L. R. 612.

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1898
April 27.

[IN THE COURT OF APPEAL.]

KOTCHIE AND ANOTHER *v.* THE GOLDEN SOVEREIGNS, LIMITED. BRIGHT AND OTHERS, CLAIMANTS.

Practice—Interpleader—Seizure of Goods in Execution—Payment into Court by Claimant—Seizure of the Goods by another Execution Creditor—Goods claimed by Claimant—Further Payment into Court.

Where goods seized in execution under a judgment have been claimed and the claimant has paid into court money to abide the event of an interpleader issue between himself and the execution creditor, and the goods are again seized in execution by another judgment creditor and again claimed by the claimant and an interpleader issue is ordered, to prevent the goods being sold the claimant must pay money into court as security to the second execution creditor, and to abide the event of the second interpleader.

APPEAL from an order of a judge at chambers.

The plaintiffs in an action of *Smythe & Sons* v. *The Golden Sovereigns, Limited*, recovered judgment, and certain goods on the premises of the defendants were taken in execution. Bright and the Credit Assurance Corporation, Limited, each claimed the goods, and the sheriff interpleaded. An order was made that the claimants should bring 137*l.* into court to abide the event of an interpleader issue, and this was done by the Credit Assurance Corporation, and an issue was directed between the plaintiffs and the claimants, and the sheriff withdrew. Before the hearing of the issue, Kotchie & Ousey, the plaintiffs in the present action, having recovered judgment for 159*l.* against the same defendants, the goods were again seized in execution. Thereupon Bright and the Credit Assurance Corporation again claimed the goods, and the sheriff interpleaded. An order was made by a master at chambers that 147*l.*, including 10*l.* for the charges of the sheriff, should be paid into Court, 137*l.* by Bright and 10*l.* by the Credit Assurance Corporation, to abide the event of an interpleader issue between the plaintiffs and the two claimants.

On appeal Grantham J. varied the order of the master by directing that the amount to be paid in by the claimants should be 10*l.*, being 147*l.*, the full value of goods and sheriff's charges, less 137*l.*, the amount already paid in under the former order in Smythe & Sons' interpleader.

The plaintiffs appealed against this order.

Carrington, for the plaintiffs. The case of *Haddow* v. *Morton* (1) shews that on the payment into court on an interpleader the plaintiff looks to the money paid into court to satisfy his claim. The goods are therefore free, and the second execution creditor is entitled to be secured in the event of the claimant not establishing his claim.

Boxall, for the claimants. In the case cited the execution creditor had been paid the money deposited, and was held to be estopped from again setting up a right to seize the goods. The question in this case is whether a claimant is bound to pay into court every time an execution is put in. To oblige him to do so might be prohibitive of his asserting his rights. It is not equitable to make him pay in money on every execution. But for the payment into court on the first interpleader the second execution creditor would have had no interest in the goods until the decision of the first issue. The value of the goods must for this purpose be taken to be that put on them by the sheriff, so that the second execution creditor would not have the security of the goods, and the claimants ought not to be called on to improve his position by payment into court.

Carrington, in reply.

A. L. SMITH L.J. In this case it appears that Smythe & Sons brought an action against the Golden Sovereigns, Limited, and obtained judgment. An execution was put in, and goods in the possession of the defendants were seized, and thereupon two claimants came forward and each claimed the goods. They did not want the goods to be sold, and an order was made that

(1) [1894] 1 Q. B. 95, 565.

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they should pay 137*l.* into court to abide the event of an interpleader issue which was ordered. This was done by one of the claimants, the Credit Assurance Corporation, and an issue was ordered and the sheriff withdrew. What is the result of this? I am satisfied on reading the judgments in *Haddow* v. *Morton* (1) that the effect is that, on the sheriff withdrawing from that moment the goods are free goods in the hands of the execution debtor, and they may be seized on another execution. The judgment of Charles J. was clearly to the effect that the goods were not protected from seizure at the suit of a second execution creditor of the defendant, and with that view I agree. What happened in this case was that other creditors who had a judgment against the defendants put in an execution, and the two claimants again claimed the goods, and an order was made that they should pay money into court to abide the event of the interpleader between themselves and the second execution creditors, and as a security to them. That order was taken on appeal to Grantham J., who has held that it is wrong, and that all that the two claimants should be called on to pay is 10*l.* to cover the extra costs of the sheriff. The second execution creditors object that this is no security for their debt, which is a considerable one. They say that they have put in an execution on free goods on which they were entitled to levy, and that they ought not merely to be secured to the extent of the sheriff's charges, but to the whole value of the goods. If it could be made out that all that the second execution creditors could get, if they were successful in the issue, would not exceed 10*l.*, the order would be correct; but this is not so in the present case. I think that the order made by the master was right, and that this appeal should be allowed.

CHITTY L.J. I am of the same opinion. It has been settled by the case of *Haddow* v. *Morton* (1) that payment into court by a claimant of goods which have been seized in execution is not a purchase of the goods by him. The money paid in

(1) [1894] 1 Q. B. 95, 565.

remains as a security to the execution creditor to abide the event of the interpleader, and if the claimant succeeds he gets the goods and gets back the money he has paid into court. If the claim is defeated, the result is that the execution creditor takes the money and cannot again have recourse to the goods on the same judgment. The result is that the property in the goods does not pass pending the interpleader issue, and they remain subject to seizure under another execution. Here other creditors have put in an execution, and claims have been set up to the goods against them by both the claimants. It seems to me that, by the same course of reasoning as that in *Haddow* v. *Morton* (1), the result is that the order to be made in this second case should be one that gives a money security to the second execution creditors for whose execution the goods are available, unless either of the claimants succeeds in shewing that they are his or their property.

The result in my opinion is that the order of the master was right and should be restored.

Appeal allowed.

Solicitor for plaintiffs: *G. B. W. Digby.*
Solicitors for claimants: *Greenwood & Greenwood.*

(1) [1894] 1 Q. B. 95, 565.

A. M.

1898
May 17.

JENKINS & SONS *v.* COOMBER.

Bill of Exchange—Indorser—Bill not complete and regular—Indorsement by way of Security—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 55, 56.

It was agreed between the plaintiffs and A., who owed them money, that they should draw a bill on him, and that the defendant, who was A.'s father, should indorse it to guarantee payment. They accordingly drew a bill on A. to their own order and, without indorsing it, gave it to A., who returned it to them accepted by himself, and indorsed by the defendant. They then indorsed it, and it was not paid at maturity.

In an action against the defendant:—

Held, that he was not liable as indorser under s. 55 of the Bills of Exchange Act, 1882, nor as having incurred the liabilities of indorser under s. 56, since at the time he put his name on the bill it was not complete and regular on the face of it, as it lacked the plaintiffs' indorsement; nor was he liable on a contract of suretyship, since the provisions of the Statute of Frauds were not satisfied.

The principles laid down in *Steele* v. *McKinlay*, (1880) 5 App. Cas. 754, are not affected by the provisions of the Bills of Exchange Act, 1882.

APPEAL from the Westminster County Court.

The action was brought on a bill of exchange, which was in the following form:—

"London, Aug. 5, 1897.

"£57 : 0 : 0

"Three months after date pay to our order the sum of Fifty-seven pounds for value received.

"J. Jenkins & Sons.

"To Mr. Arthur Coomber.

"Accepted payable at the London and County Bank. Arthur Coomber."

Indorsed "Alfred Coomber," "J. Jenkins & Sons."

It appeared that in 1897 Arthur Coomber, who was the son of the defendant Alfred Coomber, owed money to the plaintiffs Jenkins & Sons. Arthur Coomber requiring time for payment, it was arranged between him and the plaintiffs that they should draw on him at three months, and that his father, the defendant, should indorse the bill to guarantee payment. The plaintiffs

accordingly drew this bill upon him to their own order and, without indorsing it, gave it to Arthur Coomber. He took it to the defendant, who wrote his name on the back of it, receiving no consideration for doing so, but, as he said, "in order to carry his son a bit further." Arthur Coomber then returned the bill to the plaintiffs, accepted by himself and indorsed by the defendant, and the plaintiffs afterwards indorsed it. The bill was not paid at maturity, and this action was brought by the plaintiffs against Alfred Coomber as indorser.

The county court judge gave judgment for the defendant, and the plaintiffs appealed.

C. L. Attenborough, for the appellants. The learned county court judge has decided this case on the authority of *Steele* v. *McKinlay*. (1) That case is no longer an authority since the Bills of Exchange Act, 1882. In *Bank of England* v. *Vagliano Brothers* (2) Lord Herschell said (3) that the Bills of Exchange Act was intended to be a code of the law relating to negotiable instruments, and continued: "I think the proper course is in the first instance to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view." Acting on this canon of construction, it becomes necessary to see whether the question raised by this case cannot be disposed of by the Bills of Exchange Act without having recourse to the principles enunciated in *Steele* v. *McKinlay*. (1) The defendant by putting his name on the back of this bill either indorsed it or, under s. 56, incurred the liabilities of an indorser. Indorsement by s. 2 is defined as meaning an indorsement completed by delivery, as was the case here; and by s. 55, sub-s. 2, the indorser of a bill, by indorsing it, engages that if it be dishonoured he will compensate the holder. The plaintiffs are certainly the holders of

(1) 5 App. Cas. 754. (2) [1891] A. C. 107.
(3) [1891] A. C. at p. 145.

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the bill within the definition of s. 2, even if they are not, as I submit they are, holders in due course.

Abrahams, for the respondent. The respondent is not liable. He did not sign as indorser, but merely as surety or security for his son. He is not liable under the law merchant, because by that law an indorser cannot be liable to the drawer, who is a prior party to the bill. Nor can he be made liable as on an independent contract of guarantee, there being no sufficient writing to satisfy the Statute of Frauds. The Bills of Exchange Act, 1882, was merely intended to codify, and not to alter, the existing law relating to bills of exchange, as is shewn by the title to the Act. The case of *Steele* v. *McKinlay* (1), in which the facts are similar, is precisely in point.

Until this bill had been indorsed by the plaintiffs no property in it passed, as it was drawn to their order. The defendant's signature is, therefore, altogether inoperative. Sect. 55 of the Act of 1882 only deals with the liabilities of indorsers, and s. 56 relates to a person signing a bill as the defendant did as an "aval" only. Such person incurs liabilities to "a holder in due course" only. That expression is defined by s. 29 of the Act, and it is clear that the plaintiffs cannot bring themselves within it. This bill commencing with the signature of the defendant could never be "complete and regular on the face of it." [He cited *Wilkinson* v. *Unwin*. (2)]

Attenborough, in reply. There is no objection to the drawer of a bill suing the indorser if by the agreement of the parties the drawer was not to be liable to the indorser. In *Wilkinson* v. *Unwin* (2) the facts were similar to the present case, except that the plaintiffs there, who were the drawers, indorsed the bill before it was sent to the defendant for indorsement, and the defendant was held liable. The fact that the plaintiffs here indorsed the bill after and not before the defendant ought not to be allowed to defeat the admitted intention of the parties. *Steele* v. *McKinlay* (1) is distinguishable on the ground that there was no clear evidence there that the parties intended that the indorser should be liable, while here that is admitted. It is distinguished on that ground in *Wilkinson* v. *Unwin*. (2) [He

(1) 5 App. Cas. 754. (2) (1881) 7 Q. B. D. 636.

referred to s. 37 of the Bills of Exchange Act, 1882, and *Holmes* v. *Durkee*. (1)]

WILLS J. I am of opinion that the county court judge was right in this case. I do not think that the Bills of Exchange Act, 1882, was intended to effect such an important alteration in the law as to override the decision of the House of Lords in *Steele* v. *McKinlay*. (2) That decision seems to me to be in force at the present time. It is clear that, in the present case, when the defendant wrote his name upon the bill it was not complete and regular on the face of it. Nor, indeed, did it become so at any time. Sect. 56 of the Bills of Exchange Act, 1882, provides that a person who signs a bill otherwise than as drawer or acceptor incurs the liabilities of an indorser "to a holder in due course." But by s. 29 a "holder in due course" is a holder who has taken a bill complete and regular on the face of it. Sect. 56 therefore does not apply. This was not on the face of it a regular and complete bill of exchange, since when the defendant indorsed it the bill had not been indorsed by the plaintiffs, to whose order it was payable. But then it is said that the defendant is liable under s. 55, sub-s. 2, as an indorser because his name is on the back of the bill. The Bills of Exchange Act certainly does not give much assistance as to the meaning to be attached to the word "indorsement." It says (s. 2): "'Indorsement' means an indorsement completed by delivery"; but it nowhere says what constitutes "an indorsement." Lord Watson, in *Steele* v. *McKinlay* (3), draws a distinction between a person who in the nature of things could be the indorser of a bill and a stranger who writes what if he had a right to indorse would be an indorsement on the bill, although he has no right to the contents. He says that it is perfectly consistent with the principles of the law merchant that a person who writes an indorsement with intent to become a party to a bill should be held (notwithstanding that he has not, and therefore cannot give, any right to its contents) to be subject to all the liabilities of a proper indorser. In that case,

(1) (1883) 1 Cab. & Ell. 23. (2) 5 App. Cas. 754.
(3) 5 App. Cas. at p. 782.

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as in this, the difficulty was that, though the person who wrote his name on the back may have meant to become a party to the bill, he never did become so in fact because the bill was never made complete, so far as he was concerned, by the necessary indorsement of the drawer. It seems to me here that the law merchant, unless it was materially altered by the Bills of Exchange Act, 1882, which I do not think, has no application. The cases which have been cited by Mr. Attenborough to establish the liability of the defendant as indorser are all cases where the bill was a complete and perfect instrument. Here, as I have already said, the bill was not a complete negotiable instrument until it had received the indorsement of the drawers. The result of those cases is that, where there is an agreement between the parties which precludes the notion that the holder of the bill is liable to the indorser, the holder is not prevented from suing the indorser on the ground of circuity of action. The general principle since the Act of 1882 seems to me to be exactly as it was laid down in *Steele* v. *McKinlay* (1), and the contract of indemnity on which the plaintiff relies is one which is not recognised by the law merchant, but which arises solely from an agreement between the parties. It is, however, here relied upon as giving a primary liability against the defendant upon this bill of exchange. That, as Lord Watson points out in *Steele* v. *McKinlay* (1), will not do. If the agreement exists at all, it must exist as a contract of suretyship, and for that purpose it must satisfy the requirements of the Statute of Frauds.

For these reasons I am of opinion that this appeal must be dismissed.

KENNEDY J. I am of the same opinion, and for the same reasons. I do not think that the doctrines laid down in *Steele* v. *McKinlay* (1) have been varied by the Bills of Exchange Act, 1882. In the edition of that Act by Mr. Chalmers, he expressly gives *Steele* v. *McKinlay* (1) as an illustration to s. 56, without a suggestion that the law laid down in that case has in any way been altered. This document was, according to

(1) 5 App. Cas. 754.

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the law merchant, irregular, and therefore the defendant is not liable upon it to the plaintiffs. If it is sought to use it as an agreement of suretyship, it is insufficient to satisfy the provisions of the Statute of Frauds.

Appeal dismissed. Leave to appeal refused.

Solicitors for appellants: *Attenborough & Son.*
Solicitors for respondent: *Biggs, Roche & Co.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1898
March 9.

BAGSHAWES, LIMITED *v.* DEACON.

Sheriff—Execution—Seizure of Goods—Going out of Possession—Abandonment.

Where a sheriff, who has seized goods under a writ of execution, goes out of possession, the question whether he has abandoned possession is a question of fact.

APPEAL from a judgment of Ridley J. on an interpleader issue.

A. Bagshawe, trading as Bagshawe Brothers & Co., owed money to Deacon, the defendant in the issue, who recovered judgment, and an execution was put in, and goods seized by the sheriff on July 10, 1897, on the premises occupied by Bagshawe Brothers & Co. The sheriff's officer was informed by A. Bagshawe of an impending sale of all the property to a trustee for the limited company, and that it would be very inconvenient to have a man in possession, and he was paid 80*l.*, a part of the amount due to Deacon, the execution creditor, and promised payment of the balance. He also received from A. Bagshawe a document headed, "Deacon *v.* Ourselves," and to this effect: "In consideration of your withdrawing the man from possession under the warrant you hold in the above matter, we undertake that you shall be at liberty to re-enter here at any time until this action is settled. Bagshawe Brothers & Co." The sheriff's officer thereupon withdrew. The proposed sale to the limited company was completed, as

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from the previous March 25, by deed of assignment on July 12, and they took delivery of the stock of the business, including the goods in dispute in this issue. On the 13th the sheriff's officer again took possession of the goods under the writ of fi. fa. On the 15th the limited company gave notice to the sheriff that they claimed the goods. The sheriff thereupon interpleaded.

At the trial Ridley J. gave judgment in favour of the claimants, Bagshawes, Limited.

The execution creditor, Deacon, appealed.

Atherley Jones, *Q.C.*, and *R. James Willis*, for the execution creditor. If a sheriff abandons goods that he has seized under a writ of fi. fa. he would be a trespasser if he re-entered; but in this case his seizure had not altered the property in the goods, and he had the authority of the owner to re-enter. It is not necessary that the sheriff should always be in physical possession of the goods as notice that they are in possession of the law.

[They cited *Blades* v. *Arundale* (1); *Ackland* v. *Paynter* (2); and *Hunt* v. *Hooper*. (3)]

Bosanquet, *Q.C.*, and *Morton Smith*, for the claimants. The point is not whether the sheriff abandoned the writ, but whether he abandoned possession under it. If he did abandon possession, it is not material that he intended to retake the goods. It is true that the sheriff need not be continually in possession if there is any necessity for his absence; but here there was no necessity for his going out. The evidence shews that he abandoned possession, induced to do so by the payment of the 80*l.* and the promise of the payment of the balance, and because it was pointed out that the carrying out of the sale would be imperilled if an officer were in possession.

[They cited *Crowder* v. *Long* (4); *Swann* v. *Falmouth* (*Earl*) (5); *Eldridge* v. *Stacey*. (6)]

Atherley Jones, *Q.C.*, in reply.

(1) (1813) 1 M. & S. 711.
(2) (1820) 8 Price, 95.
(3) (1844) 12 M. & W. 664; 13 L. J. (Ex.) 183.
(4) (1828) 8 B. & C. 598.
(5) (1828) 8 B. & C. 456.
(6) (1863) 15 C. B. (N.S.) 458.

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A. L. SMITH L.J. This is an appeal in an interpleader issue, and the question in the case arises in this way. Deacon had trading transactions with Bagshawe Brothers & Co., who owed him money. He obtained judgment and put in an execution, under which the sheriff seized certain stock-in-trade and furniture. What had happened previously was that Bagshawe Brothers & Co. had agreed to sell to a trustee for the plaintiff company, Bagshawes, Limited, and on July 10, when the sheriff went in, this sale was about to come off. The officer was told that the goods were about to be sold, and he was given a document under which, if the man in possession was withdrawn, he was to be at liberty to re-enter at any time until the action of the execution creditor was settled. The man was thereupon withdrawn. The question is, For what reason did the sheriff's officer go out? There was no need for him to go out, and it was not a case of any temporary necessity taking him away. I think the result of the evidence is that what induced him to go out was that the sale of the business and goods to the limited company might be carried through. Bagshawe told the sheriff that it would be inconvenient to have a man in possession because of the impending sale, and thereupon he withdrew. It is said that is not enough, and it must be shewn that he had an intention to abandon possession, and that he did not abandon the proceedings, but merely abandoned possession for a time, as was shewn by the document giving him liberty to re-enter. The answer is that the sheriff did abandon possession. In my opinion, the cases of *Ackland* v. *Paynter* (1) and *Blades* v. *Arundale* (2) shew that it is a question of fact whether a sheriff has abandoned possession. I am of opinion that the decision of Ridley J. was right, and that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion. An execution was put in on July 10, and the officer went out on the same day, taking authority to re-enter, which he did on the 18th. In the meanwhile the goods had been assigned to third persons. The question is, whether the officer, having withdrawn under

(1) 8 Price, 95. (2) 1 M. & S. 711.

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the circumstances of this case, had any right to re-enter. On the evidence, I have come to the conclusion that he had not such a right. It is clear that he went out because it was inconvenient to the execution debtors to have an officer in possession in view of the sale to the limited company. The obvious inference, to my mind, is that the sheriff withdrew in order to enable Bagshawe Brothers & Co. to sell and dispose of the goods which at that time were in the custody of the law. That alone is sufficient to shew that there was an abandonment. I am by no means satisfied that withdrawal as an act of mercy is not itself an abandonment. The inclination of my opinion is in favour of the view that it is. In *Ackland* v. *Paynter* (1) Graham B. said: "I do not mean to lay down the general proposition, that a sheriff can in no case quit possession without any qualification; but I should consider, that to shew it is not an abandonment, he ought to be able most clearly to account for it, as being caused by some urgent necessity, and to give very satisfactory evidence of that." Nothing of the kind has been suggested in this case, and I am of opinion that the appeal fails.

Appeal dismissed.

Solicitor for execution creditor: *T. M. Richards.*
Solicitors for claimants: *Walker & Rowe.*

(1) 8 Price, 95.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
May 11.

LUMSDEN *v.* BURNETT.

Distress—Taxes—Sum due not exceeding 20*l.—Charges for Man in Possession —Real Possession—The Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1—*The Distress (Costs) Act*, 1827 (7 *& 8 Geo.* 4, *c.* 17).

By the Distress (Costs) Act, 1817, no person making a distress for rent where the sum demanded and due does not exceed 20*l.*, shall receive more than the charges fixed in the schedule to the Act, and "no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done." By the Distress (Costs) Act, 1827, the provisions of the previous Act were extended to distresses for assessed taxes or other rates or taxes where the sum demanded and due does not exceed 20*l.*

Where goods are distrained for taxes less in amount than 20*l.*, the collector who distrains has no right to the statutory charge for a man in possession unless he has remained in real possession, or unless there is an agreement binding on the person whose goods are distrained to pay such charges.

APPEAL from a judgment of a Divisional Court.

This was an action commenced in the county court to recover back a sum of money paid to a collector of income tax in respect of a claim for 2*s.* 6*d.* a day for a man in possession. The plaintiff's goods had been distrained for taxes less in amount than 20*l.*, but the bailiff who was put in possession went out on receiving a written authority to re-enter. This document, given by the plaintiff's daughter, was not authorized by or binding on the plaintiff. The claim was settled six days later, but a demand was made for 15*s.* for the man in possession, which the plaintiff paid under protest. The county court judge held that the plaintiff's daughter had no authority to sign the paper, and that there never was any valid distress or real possession, or if there had been possession it had been abandoned, and he gave judgment for the plaintiff.

The Divisional Court (Day and Lawrance JJ.) gave judgment for the defendant.

The plaintiff appealed.

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April 26. *Bowen Rowlands*, *Q.C.*, and *W. Addington Willis*, for the plaintiff. The county court judge held that the plaintiff's daughter had no authority to sign the paper, and that there never was any valid distress or real possession of the goods by the bailiff, or, if there were, it had been abandoned. The question is one of fact, and his finding is conclusive. By 57 Geo. 3, c. 93, s. 1, a statutory schedule of costs which may be taken in respect of distresses for 20*l.* or less is given; and it is provided that no person shall make any charge for any act, matter, or thing mentioned in the schedule, unless such act shall have been really done. By 7 & 8 Geo. 4, c. 17, the provisions of the Act of Geo. 3 are rendered applicable to distresses for taxes. Assuming that there was a distress and that it had not been abandoned, there was not really possession in this case during the time charged for, so that the charges for possession were invalid.

Macmorran, *Q.C.*, and *Lincoln Reed*, for the defendant. There is no doubt that there was a good distress in this case. Upon making the distress the bailiff might either take the goods away and impound them elsewhere, or he might follow what is the more usual course, as he did in the present case, by impounding them on the premises. The question is whether after making the distress he abandoned it. There was no evidence of such an abandonment. It is not necessary that there should be constant actual possession of the goods by the bailiff. The document signed by the plaintiff's daughter is material as shewing that the bailiff did not intend to abandon the distress, quite apart from any question as to her authority to sign it. *Swann* v. *Falmouth* (*Earl*) (1) shews that there was a good distress here, and that the fact of the bailiff's quitting the premises is no abandonment of the distress. It cannot reasonably be a ground for complaint by the party distrained upon that the bailiff does not remain constantly in the house. The statute 57 Geo. 3, c. 93, cannot mean that the bailiff must be constantly in actual possession of the goods all the day in order that the charge for possession may be lawful. By the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 86,

(1) (1828) 8 B. & C. 456.

sub-s. 4, every distress levied by a collector is to be kept for the space of five days at the costs and charges of the person refusing to pay. The 2*s.* 6*d.* a day was a cost or charge which the collector was entitled to make.

Bowen Rowlands, Q.C., in reply. The statute 57 Geo. 3, c. 93, was directed to a particular class of distress and to the evils likely to arise. It may be that if the taxpayer himself had signed the paper, that would have bound him to pay; but there was nothing binding him to do so, and the collector had not such possession as gave him a right to charge as if his man had been in possession all the time. [He cited *Blades* v. *Arundale* (1); *Ackland* v. *Paynter* (2); *Eldridge* v. *Stacey*. (3)]

Cur. adv. vult.

May 11. A. L. SMITH L.J. read the following judgment:— The amount in dispute in this appeal is insignificant, but the point raised is of some practical importance, and the case has acquired the name of "The Walking Possession Case." It raises the question, whether a collector of income tax when he distrains upon the goods of a taxpayer for unpaid income tax which does not exceed 20*l.* (in this case amounting to the sum of 13*s.* 4*d.*) is entitled to levy upon the taxpayer, in addition to the tax due, 2*s.* 6*d.* a day for a man in possession (amounting in this case to 15*s.*, i.e., six days at 2*s.* 6*d.* per day), when in truth and in fact the man had not been really in possession, but at the most has been in constructive possession of the goods distrained.

The facts are these. In the early part of January, 1897, the tax-collector, who is the defendant, left with the taxpayer, who is the plaintiff, a printed document which the plaintiff himself designated as being the "customary demand note." It is a document headed in large type "Income tax, house duty, and land tax payable on or before the 1st of January, 1897." The document states the amount of duties payable for the year 1896–7 by the taxpayer, which in the present case was duty under Sched. D at 8*d.* in the pound, amounting in all to 13*s.* 4*d.*

(1) (1813) 1 M. & S. 711. (2) (1820) 8 Price, 95.
(3) (1863) 15 C. B. (N.S.) 458.

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At the foot of this demand note in large type are the words, "This notice must be produced at the time of payment or sent with remittance." Although the plaintiff was served with this demand for payment of income tax he wholly disregarded it, and did not pay the 13*s.* 4*d.* due and demanded. Time went on without the tax being paid, and upon April 29, 1897, the tax-collector, accompanied by a man, went to the plaintiff's premises armed with two printed documents, the one being a document headed "Queen's Taxes," "Arrears Warrant," and which, when filled up, as it subsequently was, gave the taxpayer notice that the collector had upon that day seized and distrained upon the taxpayer's goods and chattels for income tax, Sched. D, 13*s.* 4*d.*, due upon January 1, 1897, and also that unless that amount, together with the charges attending the distress, was paid within five days from April 29, 1897, the goods and chattels seized would be sold according to law. The charges mentioned in the document in addition to the tax of 13*s.* 4*d.*, were "levy, 3*s.*"; "man, 2*s.* 6*d.* per day."

The inventory of goods seized was thus filled in, "shop, eight pair trousers." The other printed document which the collector then took with him to the plaintiff's house was the following:—

"To Mr. H. E. Burnett, 24, Queen's Road, S.E., or whom it may concern." (This is the defendant's, the collector's, name.) "I hereby authorize you to re-enter at any time upon the premises No. , by force or as you may think fit, and to break open doors or windows for the purpose of taking possession under your warrant of distress, and I also undertake not to move away, or allow to be moved away from the said premises any of the goods and chattels which are now therein, until the amount levied for, together with all costs and charges of maintaining the levy, are duly paid and settled. And in the event of the man now in possession quitting the said premises temporarily, or from any cause whatever previous to the removal, by you, of the said goods from the above-mentioned premises, or the distraint being otherwise satisfied, it shall not be considered in any way an abandonment of the levy.

"I also undertake not to replevy the said goods and chattels,

and not to bring any action or actions at law against you or either of you, or prefer any indictment for any of your proceedings in this matter.

"Dated this 29th day of April, 1897."

The only person the tax-collector and his man found upon the plaintiff's premises upon April 29, 1897, was the taxpayer's daughter, a child of about thirteen and a half years of age, whose signature the tax-collector then obtained to the printed document above mentioned, having first demanded the tax of 13*s*. 4*d*. from her.

This child had no authority whatever from her father, the plaintiff, to sign this document, then for the first time produced by the tax-collector, and, indeed, the father never knew of this document, nor that his child had signed it, till long afterwards, when the tax-collector was insisting that the taxpayer should pay him 2*s*. 6*d*. per day for the man having been, as he alleged, in possession for six days, amounting to the 15*s*. then claimed by him.

Upon this 29th of April, 1897, the collector, accompanied by the man as before stated, distrained upon the eight pair of trousers in the shop and left the document headed "Queen's Taxes," "Arrears Warrant," filled up as before mentioned, upon the plaintiff's premises. The collector and his man then left the plaintiff's premises taking with them the document signed by the plaintiff's child, neither the collector nor the man remaining in possession of the goods distrained, though it appears that during the six days the man daily returned to the neighbourhood to keep, as he said, "watch on the premises and to see that nothing was removed," and this man also stated that sometimes he was in possession of two houses in one day.

It seems to me, for reasons hereafter, that the findings of fact of the learned county court judge, if they be findings of fact, are wholly immaterial to the decision of this case. If material, I could not agree with some of them, for in my opinion they are not only founded upon no evidence at all, but are directly contrary to the undisputed evidence in this case. For instance, the county court judge in his judgment states that no demand for the tax due was made upon the taxpayer other than the

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demand upon the child upon April 29, 1897, ignoring altogether the service of the demand note on or about January 1, 1897, and the continued and deliberate non-payment by the plaintiff of the tax due till the distress was made upon April 29, 1897. Again, this continued non-payment the county court judge holds to be no evidence of a refusal to pay, for he holds that there was "no refusal to pay the tax in the sense intended by the Act of Parliament," whatever that may mean.

The county court judge also states that the defendant levied a distress which was in the first instance improper; and he afterwards abandoned it by not having a man in possession in such a way as to make it continuous possession.

We held in this Court not long since, in the case of *Bagshawes, Limited* v. *Deacon* (1), after full argument and discussing, amongst other authorities, *Ackland* v. *Paynter* (2), *Swann* v. *Falmouth* (*Earl*) (3), and *Eldridge* v. *Stacey* (4), that where a sheriff goes out of possession and the point arises as to whether he has abandoned possession or not, the question always is one of fact, and is whether the sheriff by going out of possession, as he did here, abandoned the possession. A sheriff in some circumstances may go out of possession and again re-enter without having abandoned possession, and the question always is whether what he has done amounts to an abandonment of possession. Although the document signed by the child in this case clearly does not bind the plaintiff and is no evidence against him, yet it is strong evidence to shew that the collector did not abandon possession, and his employing and paying a man to go and see that the goods distrained were not removed affords corroborating evidence that he went out with the intention of returning, and not of abandoning possession. But these findings of the county court judge are immaterial to the real question he had to try, which is the right of the collector apart from agreement to levy upon the plaintiff for the 15*s.* for the man said to have been in possession when the distress was for an amount not exceeding 20*l.* This question has to be decided upon the statute regulating distresses for income tax

(1) Ante, p. 173.
(2) 8 Price, 95.
(3) 8 B. & C. 456.
(4) 15 C. B. (N.S.) 458.

not exceeding 20*l.*, which appears to have been altogether overlooked by the county court judge, and is not alluded to in the Divisional Court, which decided the case upon the question of whether there had been an agreement by the taxpayer to pay the 2*s.* 6*d.* per day whether the man was in real possession or not, of which in my opinion, with submission to the Divisional Court, there was not a tittle of evidence.

I am not aware of any Act of Parliament regulating the charges to be made when the sum distrained for exceeds the sum of 20*l.*; but from text-books of repute I find that for such expenses the general practice appears to be to charge 1*s.* in the pound for the levy, and 3*s.* 6*d.* per day for the man in possession.

But there is an Act of Parliament which regulates what is to be charged by a collector for distress for income tax when such unpaid tax does not exceed 20*l.*, and this is the Act of 1827 (7 & 8 Geo. 4, c. 17).

The matter stands thus. By the Taxes Management Act, 1880 (43 & 44 Vict. c. 90), s. 86, sub-s. 1, it is enacted that "If a person refuses to pay the sum charged upon him by virtue of the Tax Acts or that Act, on demand made by the collector . . . . such collector may and he is hereby authorized and required for non-payment thereof to distrain . . . . the person so charged by his goods and chattels . . . . without any further authority from the commissioners for that purpose than the warrant to such collector delivered on his appointment."

By sub-s. 4, it is enacted that every distress levied by a collector shall be kept for the space of five days at the costs and charges of the person so refusing to pay; and by sub-s. 5, if such person does not pay the respective sums of money so due within the five days, that the distress after appraisement may be sold by the collector for payment of the said money, and the overplus coming by the said distress (if any there be), after deducting the said money, and also the costs and charges of taking, keeping, and selling the said distress, shall be restored to the owner.

The question arises, What are these costs and charges? This brings me to the Acts of 1817 and 1827. By the Act of 1817

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(57 Geo. 3, c. 93), after reciting that divers persons acting as brokers, and distraining on the goods and chattels of others . . . . have of late made excessive charges to the great oppression of poor tenants and others, it is enacted that "from and after the passing of this Act no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of 20*l.* for and in respect of such rent . . . . shall have, take, or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on . . . . any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule and hereunto annexed, and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done." In this schedule, which is headed "Schedule of the limitation of costs and charges on distresses for small rents," is set forth as follows: "Levying distress, 3*s.*; man in possession, per day, 2*s.* 6*d.*"

Ten years afterwards, in the year 1827, by the Act of 7 & 8 Geo. 4, c. 17, all the provisions of the Act of 57 Geo. 3, c. 93, which related to distraining for rent not exceeding 20*l.* were extended to any "distress or levy made for . . . . assessed taxes or other rates and taxes . . . . whatever where the sum demanded and due for such taxes . . . . should not exceed the sum of 20*l.*"

What, then, are the charges which can be made for a distress for income tax when an amount not exceeding 20*l.* is due? It is clear that in such a case by the statute the charge for a man in possession may be made of 2*s.* 6*d.* per diem, but only if the act for which the charge is made has been really done, i.e., if the man charged for has really been in possession.

In the present case, at the most the man charged for at 2*s.* 6*d.* per day has but been in constructive possession, and it is impossible to hold that constructive possession is the same thing as real possession, for the one is a reality and the other is not. For instance, how can there be real possession by one

man of two, six, eight, or ten houses upon the same day? The thing is impossible. As, however, the statute of 7 & 8 Geo. 4, c. 17, is a statute in favour of a taxpayer owing income tax not exceeding 20*l.*, I do not see why such a taxpayer may not agree with a collector, if the former desires neither to pay the tax due nor to suffer the inconvenience of having a man in real possession, to pay the 2*s.* 6*d.* per diem to the collector, even though the man does not remain in real possession; but unless such an agreement is made, I am clear that the collector cannot claim the 2*s.* 6*d.* per day if the man does not remain in real possession. It is for these reasons I think, there being no agreement to the contrary, that the tax collector cannot charge 2*s.* 6*d.* per day for the man who has not been really in possession of the goods distrained when the income tax due amounts, as in this case, to less than 20*l.*

I think, therefore, that this appeal must be allowed with costs to the appellant (who is the taxpayer) here and below.

CHITTY L.J. read the following judgment:—I am of the same opinion. Upon the undisputed facts there was, first, a valid demand for the tax; secondly, a refusal to pay; thirdly, a right to distrain for the tax; and, fourthly, a valid distress actually levied for the amount of the tax—13*s.* 4*d.*—and the levy for 3*s.* The question of abandonment of the possession of the goods seized is one of fact. The document signed by the plaintiff's daughter does not bind him as an agreement: the daughter's signature was without any authority express or implied on his part. But the document is of importance on the question of abandonment. It shews an intention on the part of the defendant not to abandon the possession, but to retain it. Taking into consideration the document, but merely for the limited purpose above stated, and the other undisputed facts relating to the watching of the shop by the defendant's man, and his occasional entrances to see that the goods had not been removed, I say unhesitatingly that possession was not abandoned. As to the law on the subject, it is sufficient to refer to *Swann* v. *Falmouth* (*Earl*) (1), a case of

(1) 8 B. & C. 456.

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distress, and to the recent case in this Court—*Bagshawes, Limited* v. *Deacon* (1)—relating to the analogous case of the sheriff.

The real and important question on this appeal is whether the defendant was entitled to the charge of 2*s.* 6*d.* a day for the man in possession. By virtue of the statutes already referred to, the statute of the 57 Geo. 3 is made applicable to a distress for income tax, and inasmuch as the sum due for income tax did not exceed 20*l.*, that statute applies to this case. As appears from the preamble, the mischief against which the Act was directed was the oppression of poor tenants and others by excessive charges enacted in levying distresses. The enactments of the 1st section are clear, direct, and stringent. Where the sum demanded does not exceed 20*l.*, the section prohibits the having, taking, or receiving any other or more costs and charges for and in respect of the distress or any matter or thing done therein than such as are fixed by the schedule and appropriated to each act which shall have been done in the course of such distress, and the section concludes by declaring emphatically that "no person or persons whatsoever shall make any charge whatever for any act, matter, or thing mentioned in the said schedule unless such act shall have been really done." Clearly the charge for 2*s.* 6*d.* for "man in possession per day" cannot be lawfully made where the possession is merely constructive or notional: to render the charge lawful within the Act the possession must be real or actual. In this case the possession of the defendant's man was constructive merely, and not real.

Had the document signed by the plaintiff's daughter, and taken away by the defendant, been signed by the plaintiff or by his authority, the case would have stood differently. The statute does not preclude the tenants and persons for whose benefit it was made from contracting themselves out of those benefits. It would often be to the advantage of the person upon whose goods the distress is levied for a sum which he is not prepared to pay at once to get rid of the inconvenience of having the bailiff's man in actual possession; and I can see no

(1) Ante, p. 173.

valid reason why he should not be at liberty to contract to pay the 2*s.* 6*d.* a day for the man in constructive possession. To hold that he cannot so contract would inflict upon him an unnecessary inconvenience.

Appeal allowed.

Solicitor for plaintiff: *A. H. Williams.*
Solicitor for defendant: *Henry Morton Ody.*

A. M.

[IN THE COURT OF APPEAL.]

CHINA TRADERS' INSURANCE COMPANY, LIMITED *v.* ROYAL EXCHANGE ASSURANCE CORPORATION.

Insurance, Marine—Practice—Action by Underwriter against Reinsurer—Discovery of Ship's Papers.

In an action by an underwriter on a policy of marine insurance brought by him against a reinsurer, the latter is entitled to discovery of ship's papers.

APPEAL by leave from an order of Mathew J. refusing to the defendants discovery of ship's papers.

The action was brought by the plaintiffs, who were underwriters on a policy of marine insurance, and had reinsured a portion of the risk with the defendants. The defendants applied for an order for the discovery of ship's papers, which the learned judge refused, but he made an order that lists of documents should be exchanged.

The defendants appealed.

Joseph Walton, Q.C., and *Hollams*, for the defendants. The question is whether in actions on policies of reinsurance the defendant is entitled to the ordinary order for an affidavit of ship's papers, which is always made in other actions against underwriters. It is submitted that the same considerations apply in the case of an action on a policy of reinsurance as in the case of an action on the original policy of insurance. It

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may be suggested that the plaintiff in an action on a policy of reinsurance will not be likely to have access to or knowledge of the ship's papers, but the same argument would apply in the case of a policy of insurance on cargo; and it has always been the practice to make an order for production of ship's papers in an action on such a policy. The learned judge acted on an unreported case, *Norddeutsche Versicherungs-Gesellschaft* v. *Merchants' Marine Insurance Co.* (1), in which a Divisional Court, consisting of himself and Cave J., held that an order for production of ship's papers should not be made in an action on a policy of reinsurance. In *Willis* v. *Baddeley* (2) Bowen and A. L. Smith L.JJ. expressly reserved the question whether that decision was right, and Collins J. at chambers in 1897 made such an order in a case of reinsurance. The principle upon which the order for production of ship's papers depends is that there is an obligation on the assured to use the most perfect good faith, and he ought therefore to disclose all documents he may have in his custody or control affecting the loss. The insurer is entitled to see such documents in order to determine whether he will defend the action. These considerations apply to a case of reinsurance as well as to a case of original insurance. The order will only apply to documents which the plaintiffs have in their custody or control.

J. A. Hamilton, for the plaintiffs. The learned judge made an order that the parties should before the trial exchange lists of documents. The defendants have already an order for all the discovery that they could get in an ordinary action, as, for instance, an action on a charterparty or bill of lading, and it is submitted that they ought not to have the order for production of ship's papers. This is an exceptional form of discovery, and the first reported case on the subject is *Goldschmidt* v. *Marryat*. (3) It was given in an action on a policy of marine insurance at a time when the common law Courts did not order discovery of documents in other actions and originated in consent, being imposed as a term of granting an order for consolidation of actions against underwriters. The reason

(1) (Feb. 1, 1890). Unreported. (2) [1892] 2 Q. B. 324.
(3) (1809) 1 Camp. 559.

why the underwriter was held to be entitled to an order for production of ship's papers was that he had not in his possession materials for obtaining information whereas the plaintiff had. The distinction between the case of an original insurance and one of reinsurance is that in the latter case the plaintiff in all probability would not have the documents of which production is asked in his possession. The order is not confined as suggested to documents in the plaintiffs' possession; and the plaintiffs would have to endeavour to get the documents. Such inquiries would involve expense and delay in order to comply with the order. In *Henderson* v. *Underwriting and Agency Association* (1) Cave and Jeune JJ. refused to extend the practice beyond wholly marine insurance. [He also cited *West of England Bank* v. *Canton Insurance Co.* (2), *Fraser* v. *Burrows* (3), and *China Steamship Co.* v. *Commercial Assurance Co.* (4)]

A. L. Smith L.J. This is an appeal from my brother Mathew J., who gave leave to appeal. The question is, whether or not where there has been a reinsurance by an underwriter, and that underwriter makes a claim upon the reinsurer, the underwriter is liable to have an order made against him for ship's papers.

I say in limine that what my brother Mathew has done in ordering an exchange of documents in this case is amply sufficient. For that reason I was of opinion at one time that this appeal ought to be dismissed; but the learned counsel did not accept that view, and both agreed that that was not what they wished us to decide.

This question of production of ship's papers is peculiar to marine policies. It is traced back in the books to the year 1809, the time of Sir James Mansfield, and, bringing one's own experience to bear, speaking now as between the original assured and the original underwriter, it has been a matter of course, when an action was brought upon a marine policy by

(1) [1891] 1 Q. B. 557.
(2) (1877) 2 Ex. D. 472.
(3) (1877) 2 Q. B. D. 624.
(4) (1881) 8 Q. B. D. 142.

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the assured against the underwriter, that the underwriter obtained an order for ship's papers against the assured.

There does not seem to have been a doubt raised on this point in any case until we come to the year 1890, when my brothers Mathew and Cave JJ., in a case which has not been reported of the *Norddeutsche, &c., Co.* v. *Merchants' Marine Insurance Co.* (1), refused to make an order for ship's papers in a case of reinsurance. As regards that portion of the judgment which dealt with ship's papers, two members of this Court expressed an opinion in *Willis* v. *Baddeley* (2) that if the question had then been raised, whether or not the plaintiff was entitled to ship's papers, we were not prepared to agree with the decision of Mathew and Cave JJ.

There was a case at chambers before my brother Collins J. in the year 1897, to which our attention has been called, in which that judge made an order for ship's papers in a case of reinsurance. For myself, I think he was quite right in making that order.

My brother Mathew J., in the Commercial Court, has come to the conclusion that he would not make an order for ship's papers in cases of reinsurance, and this is the point counsel on each side desired to have settled. It seems to me that my brother Mathew came to the conclusion that making an order for a list of documents to be exchanged was sufficient in such a case. That is not the question we have to decide. The question is whether the old practice in cases of marine insurance, that the underwriter is entitled to get from the assured all the documents which he has under an order for ship's papers, applies to a case of reinsurance. This action is on a policy of marine insurance, and the only difference between the original insurance and the present case is that the original underwriter has reinsured part of that which he insured under the original policy.

Now as soon as Mathew J. decided, as he did in *Chippendale* v. *Holt* (3), that the reinsurer when sued by the underwriter

(1) Unreported. (2) [1892] 2 Q. B. 324.
(3) (1895) 1 Commercial Cases, 197.

had precisely the same defences as the underwriter had in an action against him by the original assured, on what principle can it be said he is not entitled to the same discovery as the original underwriter had when the original assured sued him? If the reinsurer could not raise the defences of unseaworthiness, deviation, or any such like defences as the original underwriter had, the case would be different; but when once it is settled that the reinsurer has open to him all the defences which the original underwriter had, I cannot see on principle why he is not entitled to the documents which may tend to fortify these defences. It is said that it is inconvenient, and that the reinsuring underwriter will have no documents; but the same thing might be said as between the assured and the underwriter upon goods, and it is conceded that the old rule applies to insurance on goods just as it does to insurance on ship. If the plaintiff in the action has not got and cannot get the papers, and does not know where they are, he must say so. It is said there may be reinsurance two or three times; but when any reinsurer is sued by the next preceding reinsurer, and is put under an order for ship's papers, he can say that he has not got them, and cannot get them, and the stay will be taken off.

The case of *Henderson* v. *Underwriting and Agency Association* (1) has been cited; but it is obviously distinguishable, for it arose on a policy covering loss of goods by land. What Cave J. there said was that he would not apply the rule as to ship's papers in cases arising on policies of marine insurance to policies covering land transit also.

For these reasons I think the appeal should be allowed.

CHITTY L.J. This is a case of marine insurance in which Mathew J. made the order usually made in the Commercial Court that lists of documents should be exchanged. In my opinion, that would have been sufficient in this case for the purposes of justice; but both parties desire that we should decide the point that arises from this being a reinsurance. The Courts at Westminster exercised jurisdiction in cases between

(1) [1891] 1 Q. B. 557.

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assured and underwriters to order the production of ship's papers. This, as is pointed out by Sir James Mansfield in 1809, in the case of *Goldschmidt* v. *Marryat* (1), was then the established practice, and the reasons for it are given by that learned judge. The question that now arises is whether there is any distinction when the original underwriter is suing a reinsuring underwriter. All defences that the former could himself have raised in an action by the assured are open to the defendant in such an action as the present, and that being so, no distinction can be drawn between the two cases. It has been suggested that there is greater probability in the case of an action by a shipowner that he would have ship's papers; but the authorities on this point of practice are not confined to insurances on ship, and it is plain that the practice is applicable to insurances on goods. In this latter case there is no antecedent probability that the owner of the goods would have ship's papers, but nevertheless the order for their production is made. It is unnecessary to repeat what has been already said as to the authorities, and I agree that this appeal should be allowed.

VAUGHAN WILLIAMS L.J. I agree. The question is whether the practice under which heretofore orders have been made for the production of ship's papers, by which I understand not only such as are in the actual custody and power of the plaintiff, but also those that he could produce if he chose, although they are in the actual possession of other persons, applies to cases of reinsurance.

On this point there is an unreported decision of Mathew and Cave JJ. which, judging from the shorthand note of the argument, seems to have been a decision on the express point that the practice did not apply to reinsurance. What has happened since is, on the one hand, that in this Court Bowen and A. L. Smith L.JJ. in effect expressed disapproval of that decision, with which it was not necessary to deal in the case before the Court. On the other hand, against this expression of opinion there has been a decision of the Divisional Court

(1) 1 Camp. 559.

affirming the view taken in the first-mentioned case. I do not think that we can rely on long-established practice, because, as Mathew J. pointed out in one of the cases, he had never been able to get an order for ship's papers in cases of reinsurance; in addition to which there is no trace in the cases of any such practice. That being so, we have to decide the case partly on the question of convenience and partly by application of the principles on which such orders were originally made.

The order, it is to be remembered, is a special one. Why should the assured in a case of marine insurance be called on to do more than an ordinary litigant would be called on to do? Lord Esher gives reasons for this in *China Steamship Co.* v. *Commercial Assurance Co.* (1) If the reasons there given were all the reasons for making the order, I for one should doubt whether the case of reinsurance fell within them; but I do not understand Lord Esher as giving all the reasons. I think we ought to look and see if we can whether there is anything in the position of the person against whom such an order is made which makes it, to use the words of Lord Esher, wise and right to apply this form of order to a case of reinsurance, and it seems to me that there is a sufficient reason which arises from the nature of the contract of insurance. A reinsurer is himself an assured who takes upon himself the duty, not only before but after the contract comes into operation, to act with the greatest good faith. Having that duty upon him, he may be properly called on to produce all papers that are in his possession, and to account for those that he cannot produce. I think that is the principle laid down in *Rayner* v. *Ritson.* (2) It is true that Cockburn C.J. in giving judgment does not mention this obligation; but in answer to a suggestion from Lush J., that the insurers were entitled to know all that was in the knowledge of the assured at the time of the policy, it was pointed out that it was of special importance that they should know also the circumstances of the loss. The judgment, though it does not expressly say so, seems to me to affirm the duty on the part of the assured of exercising

(1) 8 Q. B. D. 142, at p. 148.
(2) (1865) 6 B. & S. 888; 35 L. J. (Q.B.) 59.

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the greatest good faith in elucidating the facts under which the underwriter's liability may arise.

I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Hollams, Son, Coward & Hawksley.*

A. M.

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March 31;
May 14.

DAVEY & CO. *v.* WILLIAMSON & SONS, LIMITED. RICHARDS, CLAIMANT.

Company—Debenture—Floating Security—Goods seized in Execution—Rights of Debenture-holders.

A limited company issued debentures secured by a floating charge upon all the property of the company, and also by a trust deed which vested in a trustee for the benefit of the debenture-holders the leasehold property and uncalled capital of the company, and gave him the right to call upon the company to vest in him all other property of the company except chattels within the meaning of the Bills of Sale Acts. Before the time for the payment of the amount secured by the debentures had arrived certain goods of the company charged by the debentures were seized by the sheriff under a fi. fa. No winding-up resolution was passed and no receiver appointed, nor did the trustee put in force his powers under the deed, but the debenture-holders claimed the goods, and the sheriff interpleaded:—

Held, that the rights of the debenture-holders prevailed over those of the execution creditor since, the goods seized being validly charged with payment of the debentures, there was no interest of the company in them available to satisfy the judgment debt.

APPEAL from the Edmonton County Court.

In an interpleader issue tried in the county court the plaintiffs Davey & Co. were the execution creditors, and the defendant company, Williamson & Sons, Limited, were the execution debtors. Richards, the claimant, claimed on behalf of himself and other debenture-holders in the defendant company.

The learned judge gave judgment for the plaintiffs, and the claimant appealed.

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The following statement of facts is taken from the judgment of Lord Russell of Killowen C.J.:—

"The defendant company (a trading company) in January, 1894, being duly authorized to do so, issued 3000*l.* first mortgage debentures in sixty debentures of 50*l.* each, and six of these were held by Richards, the claimant. They were made a charge on all the property of the company, real and personal, present and future, not assured or charged by the trust deed hereinafter mentioned, and were payable on December 31, 1898, or on such earlier date as the principal moneys thereby secured should become payable in accordance with the conditions indorsed thereon. Amongst such conditions were the following: '(4.) The principal moneys hereby secured shall become payable immediately on the happening of any of the events hereinafter specified, and also all right of the company to deal for any purpose whatsoever with any of the property shall forthwith cease on the happening of any such events.' Here followed the events (inter alia): '(*c*) If an order is made or an effective resolution is passed for winding up the company.' '(*d*) Whenever the trustee of the within-mentioned trust deed (hereinafter called the trustee) shall have entered upon the mortgaged premises comprised in the trust deed, or appointed a receiver or receivers under the provisions therein contained.' By the 3rd condition indorsed on the debentures, it was provided that until the moneys thereby secured should become payable the debentures should be a floating security, and it was stipulated that the company should not before payment of such debentures create any charge to the prejudice of the debenture-holders without their sanction, and, finally, that no part of the property subject to the floating security of such debentures should be dealt with except in the ordinary course of the business of the company. Further, by such debentures it was provided that the holders should be entitled to the benefit of and be subject to the conditions of the trust deed. The trust deed (January 25, 1894) referred to was a deed between the company of the one part, and James Thomas Harrison, called the trustee, of the other part, by which the company demised to the trustee certain leaseholds described in the first schedule thereto, and assigned to the trustee the

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amount uncalled on the shares of the company. The trust deed also contained a covenant that the company would, immediately after being requested by the trustee, assure to or otherwise vest in the trustee the business of the company and the goodwill of such business, and all the real and personal property and assets of the company present and future, if any, not thereinbefore assigned or demised to the trustee, except chattels within the meaning of the Bills of Sale Act. The deed further provided that the premises thereby demised and assigned, and the premises comprised in the covenant, should be held by the trustee as a security for the debenture-holders, and so that the principal money and interest owing in respect of the debentures should be a fixed and not a floating charge, so far as related to such of the premises as were thereby demised and assigned respectively, and should be a floating charge so far as related to such of the premises as were comprised in the covenant, and so that the company should not create any mortgage or charge upon the premises in priority to the money and interest secured by the debentures, and, subject as aforesaid, the trustee should hold the premises upon trust to permit the company and its assigns to hold and enjoy the premises, and to carry on the business and any business authorized by the memorandum of association of the company until the happening of one or more of the events upon which the security thereby constituted became enforceable.

"The events contemplated are twelve in number, but the only important one for the purposes of this case is as follows: 'If any execution, sequestration, extent or other process of any Court or authority is sued out against the property of the company for any sum whatsoever.'

"The effect, briefly put, of the documents is that the debentures were secured by a floating charge upon all the property of the company, and that the trust deed vested in a trustee for the benefit of the debenture-holders the leasehold property and the uncalled capital of the company, and gave to such trustee the right to call upon the company to vest in him all other property of the company including the goodwill of its business, but excluding any chattels within the meaning of the Bills of

Sale Act; but the company was left free until the trustee or the debenture-holders took action, on the happening of any of the events contemplated by the deed or by the terms of the debentures, to carry on the business and deal freely, but only in the ordinary course of business, with the assets of the company.

"The company got into difficulties, and was unable to discharge its obligations by payment as they arose. In the result the plaintiffs obtained judgment against them for 11*l.* 17*s.* 9*d.*, and a writ of fi. fa. was issued under which the sheriff seized certain goods in possession of the company which were charged by the debentures. The claimant then, for himself and the other debenture-holders, claimed the goods as theirs under the debenture securities.

"The sheriff thereupon interpleaded, and the goods seized were not sold. To complete the facts, it only remains to add that the due date of the debentures had not arrived; that no winding-up resolution had been passed; that no receiver had been appointed; and that the trustee had not put in force his powers under the trust deed."

Herbert Reed, Q.C. (*Cannot* with him), for the appellant. The county court judge has held that the appellant cannot succeed, since the debentures had not become due, and no steps had been taken by him to crystallize his floating security, and, further, that the seizure in execution of the company's goods was a dealing with those goods in the ordinary course of business. It is admitted that none of the conditions on which the debentures become payable have been fulfilled, but the security created by the trust deed has become enforceable by reason of the execution. The security may be realized, although the time of payment of the debentures has not arrived: *Edwards* v. *Standard Rolling Stock Syndicate* (1); *Read* v. *Joannon* (2); *Welsted* v. *Swansea Bank* (3); *Wildy* v. *Mid-Hants Ry. Co.* (4) It is quite immaterial whether the debenture has become due or

(1) [1893] 1 Ch. 574.
(2) (1890) 25 Q. B. D. 300.
(3) (1889) 5 Times L. R. 332.
(4) (1868) 16 W. R. 409.

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not when the sheriff seizes: *In re Standard Manufacturing Co.* (1); *In re Opera, Limited* (2); *Taunton* v. *Sheriff of Warwickshire* (3); *Robson* v. *Smith.* (4)

Seizure of the goods of a company by an adverse creditor is not a carrying on of the business in the ordinary course; it is not a dealing with the goods by the company at all, as is pointed out by Kekewich J. in *Taunton* v. *Sheriff of Warwickshire.* (5) Debenture-holders have an equitable charge on the property of the company which is a floating security attaching from time to time to the property, and allowing the company to deal with the property so charged in the ordinary course of business, but on the goods being seized in execution the floating security attached.

Macaskie, for the respondents. The trust deed has nothing to do with this case. It does not purport to assign personal chattels such as were seized here. The only right of the claimant is therefore on his debenture. None of the conditions on which the debenture becomes due have happened, and where the right of the debenture-holder conflicts with that of the executor-creditor, the former must shew that the debenture has become due, and that he has intervened by getting a receiver appointed, or in some other way: *Government Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (6) Until the right has so crystallized, the debenture-holder cannot prevent the payment to a judgment creditor under a garnishee order of a debt due to the company: *Robson* v. *Smith.* (7) Execution is practically the same as a garnishee order.

In none of the cases cited was the debenture a floating security, but the security of the debenture-holder had attached. As long as the debenture remains a floating security, the company are in possession of their property for the purpose of carrying on their business in the usual way, and of doing all things necessary to enable them to carry on such business to advantage: *In re Hamilton's Windsor Ironworks.* (8) A natural

(1) [1891] 1 Ch. 627.
(2) [1891] 3 Ch. 260.
(3) [1895] 2 Ch. 319.
(4) [1895] 2 Ch. 118.
(5) [1895] 1 Ch. 735, at p. 740.
(6) [1897] A. C. 81.
(7) [1895] 2 Ch. 118.
(8) (1879) 12 Ch. D. 707.

part of such business would be the incurring of debts for which the assets of the company would be primarily liable.

H. Reed, Q.C., replied.

Cur. adv. vult.

May 14. The judgment of the Court (Lord Russell of Killowen C.J. and Mathew J.) was read by

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the decision of His Honour Judge Paterson on an interpleader issue in which the question was whether the rights of the claimant, claiming for himself and the other holders of debentures of the defendant company (the judgment debtors), to certain goods seized under a writ of fi. fa. by the sheriff prevailed over the rights of the plaintiffs, who were the execution creditors.

The learned county court judge held that they did not, and apparently on two grounds—(1.) that the rights of the debenture-holders had not become "crystallized," the debentures not having become due, and no receiver for the debenture-holders having been appointed; and (2.) that seizure of the company's goods under execution was a dealing with such goods in the ordinary course of business, and did not contravene any rights of the debenture-holders, whose securities were, in his judgment, subject to the risk of such seizure. We have to consider whether this judgment is right. [His Lordship then stated the facts as above set out, and continued:—]

In this state of things the question is, Do the rights of the debenture-holders prevail against those of the executor creditor? It may seem hard upon the execution creditors that they should not be able to realize their judgment for their debt incurred in supplying trade goods for the purposes of the company's business, and that they should be met by claims of debenture-holders of which they had no knowledge or public means of knowledge, and that such debenture-holders should be allowed to claim as theirs goods in the apparent control of the company, and upon which possibly, or indeed probably, credit had been given to them. But these are matters which concern the judgment and action of Parliament. We must determine the

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Lord Russell C.J.

rights of litigants in conformity with what we believe to be the law. In our judgment, the rights of the debenture-holders do in this case prevail against the execution creditors. We cannot assent to the view of the learned county court judge that a seizure under an execution on a judgment against the company is a dealing by the company in the ordinary course of business within the 3rd condition indorsed on the debentures, so as to be within the authority given to the company by the terms of the debentures. It is not in the ordinary course of business that the debts of a going business firm or company shall be liquidated by seizure of their assets under legal process. Nor can the transaction be properly described as a dealing by the company at all. It is a compulsory legal process directed against the company—not a dealing by them.

The second ground on which the learned county court judge proceeded was that the rights of the debenture-holders had not "crystallized," or, in other words, that the moneys secured by the debentures had not become payable. As to this, it is in the first place to be observed that although this is so, yet by reason of the clause of the trust deed, previously set out, the security constituted by that deed had become enforceable by reason of the fact that an execution had been sued out against the company. But apart from this, the sheriff can only realize the judgment against the goods of the judgment debtor. Here the goods seized are validly charged with the payment of the amount of the debentures, and it is admitted that that charge far exceeds the value of the goods in question. The rights of the execution creditors are subject, not only to the legal, but also to the equitable rights of the debenture-holders. The sheriff cannot merely by seizing affect the rights of third persons to which property was subject when in the hands of the debtor, unless, indeed, such third persons have debarred themselves from the assertion of such rights. It follows, therefore, that there was no interest of the judgment debtor in the property seized available to satisfy the judgment debt. Nor is the debenture-holder prevented from asserting his charge upon the property in the circumstances of this case. The company as a

going concern had come to an end, and although the due date of the debentures had not arrived, the holders were entitled to intervene to protect their security. Neither were they bound to apply for a receiver, or to proceed with a view to the winding-up of the company. They are entitled to say to the sheriff, "The goods seized are validly charged to us, and you cannot sell them to the prejudice of our security." No case has been cited to us, and we know of no case in which, in such circumstances as the present, the rights of the execution creditor have prevailed over those of debenture-holders.

It seems to us that this reasoning is fully supported by the authorities: see *In re Standard Manufacturing Co.* (1), in which case the rights of the debenture-holders had not "crystallized." See also *In re Opera, Limited.* (2) The result is that the appeal will be allowed.

Appeal allowed.

Solicitor for appellant: *W. B. Glasier.*
Solicitors for respondents: *McKenna & Co.*

(1) [1891] 1 Ch. 627. (2) [1891] 3 Ch. 260.

A. P. P. K.

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May 20.

COX AND OTHERS, PETITIONERS; DAVIES, RESPONDENT.

Local Government—District Council—Election—Nomination Paper—Validity of—Finality of Returning Officer's Decision—Rural District Councillors' Election Order, 1898, *r.* 7 (2).

A nomination paper of a candidate for election as a rural district councillor is not invalid by reason of its having been signed by the proposer and seconder before the name of the candidate was filled in.

MOTION to take an election petition off the file.

The petition stated that an election of rural district councillors for the parish of Crickhowell, in the rural district of Crickhowell, in the county of Brecknock, was held on April 2, 1898, when John Ward Davies, Henry Plantagenet Somerset, and John James Watkins were candidates, and John Ward Davies and John James Watkins were declared to be duly elected.

The returning officer for the rural district of Crickhowell duly gave notice that the nominations for the said election were to be delivered to him not later than Thursday, March 17.

A nomination paper purporting to nominate the said John Ward Davies as a candidate, and to be properly signed by M. A. Bevan as proposer, and C. W. Davies as seconder, was duly delivered to the returning officer on March 16.

The said nomination paper, as the petitioners since discovered, was in fact signed by the proposer and seconder, with the name, place of abode, description, and qualification of the candidate in blank, and on a date subsequent to that of the signatures, and before the nomination paper was delivered to the returning officer, the candidate himself filled in his name, place of abode, description and qualification. The nomination paper was in the form given in Form 1 of the second schedule to the Rural District Councillors' Election Order, 1898.

On March 18 the returning officer duly made out and published a statement in the prescribed form, containing (inter alia) a notice of his decision that the said nomination paper, whereby

John Ward Davies was nominated a candidate at the election, was valid.

On March 22 the returning officer duly gave public notice of the poll to be taken at the election. The notice contained the name of John Ward Davies as a candidate, and the names of M. A. Bevan and C. W. Davies as his proposer and seconder respectively.

The petitioners submitted that the nomination paper was bad, and prayed a declaration that the return of John Ward Davies was void.

Corrie Grant, for the respondent, moved to take the petition off the file on two grounds: 1. That the matter alleged by the petition was not ground for proceeding by election petition; 2. That by virtue of rule 7 (2.) of the Rural District Councillors' Election Order, 1898 (1), the decision of the returning officer was final.

[He was stopped by the Court.]

Roskill, for the petitioners. The rule of the Election Order upon which the respondent relies is practically to the same

(1) By rule 4 (2.) of the Rural District Councillors' Election Order, 1898, "The nomination paper shall state . . . . the surname and other name or names in full of the candidate and his place of abode and description, and whether he is qualified as a parochial elector, &c. . . . . It shall be signed by two parochial electors of the parish or other area, as proposer and seconder."

By rule 4 (5.), if any parochial elector signs nomination papers for more than one parish in the district, the paper first received by the returning officer is alone to be valid; and if he signs more nomination papers than there are candidates to be elected, those first received by the returning officer up to the number to be elected are alone to be valid.

Rule 6: "Every nomination paper shall be sent to the returning officer so that it shall be received at his office within the time prescribed for that purpose by the first schedule to this Order. A nomination paper received after that time shall not be valid. The returning officer shall note on each nomination paper whether it was received before or after that time."

Rule 7 (2.): "The returning officer shall, as soon as practicable after the receipt of any nomination paper, examine and decide whether it has or has not been properly filled up and signed by two parochial electors of the parish or other area and whether it is or is not invalid under rule 4 (5.) or rule 6. His decision that a nomination paper has been so filled up and signed, and is not invalid as aforesaid, shall be final, and shall not be questioned in any proceeding whatever."

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effect as that of s. 1, sub-s. 3, of the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), which provided that the mayor should attend at the town hall on a certain date to decide on the validity of any objections to nomination papers, and that "the decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination paper, be final." And under that section it was held in *Howes* v. *Turner* (1) that the mayor had no power to deal with any objections other than to the form of the nomination paper, and consequently could not decide an objection as to the time of delivering the nomination paper.

A fortiori under the present Order the returning officer can have no power to decide upon the invalidity of the nomination paper arising out of a matter not appearing on the face of the paper itself, except so far as the matter is one necessarily within his own personal knowledge, such as the date of the receipt of the paper under rule 6; for there is no power under this Order of raising an objection to a nomination paper as there was under the Municipal Elections Act, 1875. The returning officer does not sit to hear objections, but arrives at his decision privately and without assistance. It is manifest that his jurisdiction must be confined to matters necessarily within his own knowledge, or those appearing on the face of the paper. It is absurd to suppose that he was intended to give a final decision on matters with regard to which he had no information and had no opportunity of getting any.

In *Harmon* v. *Park* (2), decided under the Municipal Elections Act, 1875, which required the nomination paper to be signed by a proposer and seconder and eight other burgesses assenting to the nomination, it was held that the name of the proposer could not be altered after the assenting burgesses had signed. Lindley J. said: "The argument for the petitioner comes to this, that the eight persons might sign even before the name of the candidate was on the nomination paper." He evidently treats the contention now raised as an absurdity. Rule 4 (2.) of the present Election Order requires that the nomination paper shall state the name and abode of the candi-

(1) (1876) 1 C. P. D. 670. (2) (1881) 7 Q. B. D. 369.

date, &c.; it then goes on: "It shall be signed by two parochial electors." "It" means not merely the slip of paper, but the paper properly filled up with the above statements: *Harmon* v. *Park*. (1)

The validity of the returning officer's decision may be questioned on petition: *Howes* v. *Turner* (2); *Line* v. *Warren*. (3)

Grantham J. Counsel has endeavoured to minimise the effect of rule 7 (2.) of the Order of 1898 by referring to decisions which do not seem to me to be in point. The language of the present rule is not the same as that of the section upon which those cases were decided. It would require a good deal to convince me that there is anything wrong in a candidate filling his own name in after those of his proposer and seconder. In my own practical experience of elections it is a thing which is constantly done. If the signatures of the proposer and seconder were used for the purpose of filling in the name of a candidate that they did not intend, that would be another matter. *Harmon* v. *Park* (1) was a very different case from this. There the eight assenting burgesses signed in the belief that they were supporting a particular proposer, and it could not be taken that they assented to another person's name being substituted. Moreover, as I have said, that case was decided under a different rule. I am of opinion that in the present case the decision of the returning officer was final. The petition must, therefore, be taken off the file.

Lawrance J. concurred.

Order to take petition off file.

Solicitors for petitioners: *Bridges, Sawtell & Co.*
Solicitor for respondent: *H. W. Watkins.*

(1) 7 Q. B. D. 369. (2) 1 C. P. D. 670.
(3) (1884) 51 L. T. 359.

J. F. C.

1898
May 20.

In the matter of an Arbitration between THE GUARDIANS OF THE ROCHDALE UNION and THE GUARDIANS OF THE HASLINGDEN UNION.

Local Government—Transfer of Part of one Union to another Union—Adjustment of Property and Liabilities—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 68.

By an order made under the Local Government Acts, 1888 and 1894, part of a township within the area of the union of R. was detached from it and transferred to the union of H. On a dispute arising between the two unions as to how the liability for loans contracted by the union of R. previously to its division was to be borne :—

Held, that the liability was a matter for adjustment under s. 68 of the Local Government Act, 1894, as between the union of R. and the union of H., and not merely as between the union of R. and the portion of it which had been transferred to the union of H.

The portion of the union of R. which was so transferred to H. was a remunerative area; that is to say, the number of its poor was small in proportion to its contribution to the rates :—

Held, that the loss to R. of the contribution of the part so transferred was not a matter which of itself required adjustment under s. 68, though it was an element to be taken into consideration in adjusting other matters which did require adjustment.

Case stated by an arbitrator.

Previously to 1894 the township of Spotland was one of the townships comprised in the Rochdale Union, and the township of Newchurch was one of the townships comprised in the Haslingden Union. By an order of the county council of the county of Lancaster dated June 28, 1894, a portion of the township of Spotland was, in pursuance of the Local Government Acts, 1888 and 1894, amalgamated with a portion of the township of Newchurch into one township by the name of the township of Bacup. By an order of the same date made by a joint committee appointed by the said county council and the councils of certain county boroughs in the said county, the portion of the township of Spotland which had so become part of the new township of Bacup was detached from the Rochdale Union and was included in and became part of the Haslingden Union, and it was provided that s. 68 of the Local Government Act, 1894, should apply for the purposes of any adjustment

which might be required in consequence of the provisions of such order, subject to the proviso that the arbitrator in any adjustment between the Haslingden and Rochdale Unions should have regard to the large amount of workhouse accommodation then provided to the Rochdale Union, and to all other special circumstances of such last-mentioned union. These two orders were duly confirmed by the Local Government Board, and came into operation on December 28, 1894. On October 31, 1895, the guardians of the Rochdale Union gave notice to the guardians of the Haslingden Union that by reason of the detachment of the above-mentioned portion of Spotland from the Rochdale Union the property, debts, and liabilities of their union had been affected and a serious loss occasioned to the union, and that they were prepared to treat with the guardians of the Haslingden Union for the adjustment of the said property, debts, and liabilities, and as to the payment to be made by the last-mentioned guardians in respect thereof, and that, unless the last-mentioned guardians were prepared to treat in respect of the said adjustment, they, the guardians of the Rochdale Union, desired that the adjustment should be referred to arbitration. In default of agreement between the said unions the adjustment was referred to an arbitrator. At the hearing before the arbitrator it was contended for the guardians of the Rochdale Union that an adjustment was required for the purposes of the said Acts and orders, and that the following matters ought to be taken into consideration in making the adjustment:—

"(*a*) The amount of the outstanding loans charged upon the common fund of the Rochdale Union.

"(*b*) The exceptional number of paupers requiring relief in the Rochdale Union by reason of the density of population and the situation of the town of Rochdale.

"(*c*) The comparative absence of pauperism from the transferred portion of the township of Spotland.

"(*d*) The large amount of workhouse accommodation provided by the Rochdale Union.

"(*e*) The unsuitability and unfitness of a great part of the Rochdale workhouse for the purposes for which it was provided.

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"(*f*) The loss of all contribution from the transferred portion of the township of Spotland towards the expenses of the guardians of the Rochdale Union.

"(*g*.) The increase in the rates leviable in the remainder of the Rochdale Union by reason of the transfer."

Evidence was tendered on behalf of the Rochdale Union to the effect:—

(1.) That the workhouse of the Rochdale Union is situated in the township of Wardle in that union; that it was erected in 1877, and has from time to time been enlarged; the guardians have raised loans for the purposes of erecting, furnishing, and extending the workhouse; and that on December 28, 1894, large sums were still outstanding in respect of those loans, and were charged upon the common fund of the whole union.

(2.) That the town of Rochdale is comprised in the township of Rochdale in the Rochdale Union; that it has a dense population, and is situate on the main road leading from Liverpool, Bolton, and Manchester to the large towns and ports in the north of England, and is near to the large towns of Oldham and Bury.

(3.) That the rateable value according to the valuation lists in force on December 28, 1894, of the Rochdale Union was 512,399*l*. 5*s*., and of the portion of the township of Spotland transferred to the Haslingden Union was 33,040*l*.

On behalf of the Haslingden Union it was contended that none of those matters were matters in respect of which the arbitrator had power to award an adjustment as between the Rochdale Union and the Haslingden Union. The arbitrator was of opinion that none of the said matters relied on by the Rochdale guardians were matters for adjustment between the said parties under the said Acts and orders, and he accordingly declined to receive the evidence tendered, and awarded that no adjustment was required, subject to a case for the opinion of the Court.

Brynmor Jones, *Q.C.*, and *Alexander Glen*, for the Rochdale Union. The complaint of the Rochdale guardians is, first, that they are left with a diminished rateable area to discharge

liabilities for loans which were contracted at a time when the area of the union was intact. It seems clear that those loans are "debts or liabilities" within the meaning of s. 68 (1), and are therefore per se matters for adjustment. Secondly, the income of the union has been diminished out of proportion to the diminution of its expenses. Spotland contributed largely to the rates, and had very few poor. It was, therefore, a profitable area. A loss of rates is a loss of "income" within s. 68. Thirdly, the workhouse, being in excess of the union's requirements and expensive to keep up, is a burden rather than an advantage. That burden ought to be adjusted between the two unions.

C. A. Russell, Q.C., and *Macmorran, Q.C.*, for the Haslingden Union. The language of s. 68 is intended to be exhaustive, and nothing can be per se the subject of adjustment, except "property, income, debts, liabilities, and expenses." The expression "adjustment" in the section does not include anything in the nature of compensation for loss resulting from a redistribution of areas. It means simply an equitable division of the property and income on the one hand, and of the debts and liabilities on the other. But rates are not income for this purpose. The "income" referred to in s. 68 is income arising from land or invested moneys belonging to the union. When a particular rateable area is transferred from one union to another, the rates which that area produced while forming part of the former union may represent a sum far in excess of that which the same area will produce in the shape of rates when forming part of the new union. The rate in the pound is much higher in the Rochdale Union than it is in the Haslingden Union. So that it cannot be said that any definite sum of money which

(1) By s. 68, sub-s. 1, of the Local Government Act, 1894 (56 & 57 Vict. c. 73), "Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement."

Sub-sect. 3: "In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration."

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formerly belonged to Rochdale has been transferred to Haslingden. It is not disputed that the Rochdale Union's loss of rates by the transfer of Spotland is an element to be taken into consideration by the arbitrator if he has any matter before him requiring adjustment, but the loss of rates, not coming within the language of the section, is not a matter which per se requires adjustment. Then as to the loans: it may be that they are debts or liabilities which require adjustment as between the parties who before the transfer were jointly liable for them—that is to say, as between the Rochdale Union and the part of Spotland which has been transferred. But the Haslingden Union was never under any liability to contribute to the repayment of those loans. In cases in which the adjustment is conducted by agreement, the liabilities which by the terms of s. 68 are to be adjusted are those "of the parties to the agreement." They cannot agree to adjust the liabilities of other people. Similarly, where the parties fail to agree and the adjustment is referred to arbitration, the liabilities which the arbitrator is to adjust are those of the parties to the arbitration. The loans in question, therefore, are not matter of adjustment as between the Rochdale and Haslingden Unions. The arbitrator had not the right parties before him.

CHANNELL J. I am of opinion that in this case an adjustment is required, and that the case must go back to the arbitrator. It is not, indeed, necessary for our decision to specify in detail which of the several matters referred to in the case would, if they stood alone, be sufficient to make an adjustment necessary; but as we have been asked to do so, I am willing to indicate which of them, in my opinion, would necessarily require adjustment, and which of them are merely matters to be taken into account in considering the mode in which the other matters are to be adjusted. In the first place, it seems to me clear that the loans require adjustment. At the time when the order of transfer took effect they constituted a liability upon the entire area of the then Rochdale Union. It could hardly be contended that the division of that area extinguished the liability to repay the loans, in the same way that

a pauper settlement has been held to be extinguished by the division of the parish in which the settlement was acquired. But if the liability is still subsisting, how is it to be borne? That is a matter for adjustment. The next matter which it seems to me would require adjustment if it stood alone is the workhouse—items (*d*) and (*e*). It was provided for and belonged to the old Rochdale Union. It was the property of the ratepayers of the entire union. Therefore, if it had been of value it would obviously be a subject for adjustment as being property. If, as is suggested, it is a burden, it must, to my mind, equally require adjustment. With regard, however, to the other matters, the exceptional number of paupers in what is left of Rochdale, and the comparative absence of pauperism in the part that is taken away—items (*b*) and (*c*); and the loss of contributions from Spotland towards the expenses of Rochdale, and the increase of the rates leviable in the remainder—items (*f*) and (*g*); I am inclined to think that they are not matters which per se require adjustment, but that they are elements to be taken into account in considering how you will adjust the burden and liabilities which do require adjustment.

It has been argued that even if the matters of the loans and of the workhouse do require adjustment, they do not require adjustment as between Rochdale and Haslingden, but only between Rochdale and Spotland. The answer to that is that Spotland is now part of Haslingden. What is required is an adjustment as between the new bodies of the property and liabilities of the old bodies. If the argument for the Haslingden Union were sound, there never could be an adjustment when part of a union was taken away from it, unless the part so taken away were constituted a new union in itself.

RIDLEY J. I have nothing to add, and entirely agree in every particular with what my brother Channell has said.

Case remitted to arbitrator.

Solicitors for Rochdale Union: *Bower, Cotton & Bower.*

Solicitors for Haslingden Union: *Robbins, Billings & Co., for T. H. Townsend, Rawtenstall.*

J. F. C.

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June 15, 16, 18.

PENNY *v.* THE WIMBLEDON URBAN DISTRICT COUNCIL AND ILES.

Negligence—Public Body—Contract to execute Works—Control over Contract——Negligence of Contractor—Liability of Public Body—Payment into Court by Contractor—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A District Council, acting under the Public Health Act, 1875, s. 150, employed a contractor to make good a highway, which was used by the public, but had not become repairable by the inhabitants at large. The work was to be executed according to instructions to be furnished to the contractor by the District Council's surveyor. In carrying out the work the contractor negligently left on the road a heap of soil and grass, unlighted and unprotected. A person walking on the road after dark fell over the heap, and was injured:—

Held, that the District Council, having the control of the works, were liable for the negligent acts which they had permitted.

In an action for damages by the person injured against the District Council and the contractor, the contractor paid into court a sum exceeding the damages found by the jury:—

Held, that the payment into court by the contractor afforded no defence to the District Council, and the plaintiff was entitled to judgment against them, but as the damages had been obtained from the contractor, the judgment should be confined to costs.

Per Bruce J.: When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor, and no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do.

Hardaker v. *Idle District Council*, [1896] 1 Q. B. 335, and *Pickard* v. *Smith*, (1861) 10 C. B. (N.S.) 470, followed.

FURTHER CONSIDERATION before Bruce J.

The action was brought to recover damages for personal injury sustained by the plaintiff, by falling over a heap of surface soil and grass, placed by the defendant Iles in Queen's Road, Wimbledon, and left there on the evening of October 23, 1897, after dark, without any light, or precaution, to warn persons passing along the road of the obstruction caused by the heap.

The defendants delivered separate defences. Both denied liability. Iles paid 75*l.* into court. The District Council did not pay money into court, but stated in their defence that "the defendant Iles, while denying liability, has paid into court 75*l.*, and these defendants say that sum is sufficient to satisfy the plaintiff's claim."

June 15. The case was tried before Bruce J. and a special jury.

Lord Coleridge, Q.C., and *Stephen Lynch*, for the plaintiff.

C. Tyrrell Giles, for the defendants the Wimbledon Urban District Council.

Rawlinson, Q.C., and *Newson*, for the defendant Iles.

The following facts were proved.

The plaintiff, a lady residing at Cromwell Road, Wimbledon, was walking home on October 23, 1897, and while crossing Queen's Road, at 7 P.M., after dark, she stumbled and fell over a heap of surface soil and grass, which had been left in the road without any light or protection, and suffered serious injury. At the time of the accident the District Council had not taken over the road, but had served notice on the owner, under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), to make up the road, and on his failure to do so had entered into a contract with the defendant Iles that he should do the work. By the terms of the contract Iles was to provide all materials, plant, labour, watching, lighting, fencing, and everything necessary for the speedy and effectual completion of the work, which was to be carried out in the best and most workmanlike manner, and was to be in accordance with the specification, and certain plans and drawings prepared by the surveyor of the District Council, and such working and explanatory drawings and instructions as he might from time to time furnish. The surveyor could require improper materials to be removed and others substituted, and could procure the discharge of incompetent workmen. The work was commenced on the day before the accident, and the heaps which were left on the road were heaps of dirt and grass formed in the course of the preliminary

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process of "cleaning-up" the road. After the accident lights were placed on some of the heaps by order of the surveyor.

The jury found a verdict for the plaintiff, and assessed the damages at 50*l*. The learned Judge directed judgment to be entered in favour of the defendant Iles.

June 16. *Lord Coleridge, Q.C.* (*Stephen Lynch* with him), for the plaintiff, moved to enter judgment for the plaintiff against the defendants the Wimbledon Urban District Council. In the first place, the effect of the contract between the District Council and the defendant Iles is that the Council retained control over the work which was being done under the contract, and Iles was simply acting as their agent or servant, and not as an independent contractor. The Council are therefore liable for the negligence of Iles or his men in allowing the heaps to remain unlighted and unprotected on the road. Secondly, even if Iles can be regarded as an independent contractor, the District Council owed a general duty to the public, for the breach of which they were liable: *Hardaker* v. *Idle District Council.* (1) The District Council, having delivered a separate defence, are not entitled to any benefit from the payment into court by Iles.

C. Tyrrell Giles, for the defendants the Wimbledon Urban District Council. The effect of the contract was to put Iles in the position of an independent contractor, for whose negligence or breach of duty the District Council could not be made liable: *Reedie* v. *London and North Western Railway.* (2) In any case the verdict is satisfied by the payment into court.

Cur. adv. vult.

June 18. The following written judgment was delivered by

BRUCE J. In this case the action was brought against the Wimbledon Urban District Council and Edmund Iles to recover damages for personal injuries sustained by the plaintiff by falling over a heap of surface soil and grass, placed by the defendant Iles in Queen's Road, Wimbledon, and left there on

(1) [1896] 1 Q. B. 335. (2) (1849) 4 Ex. 244.

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the evening of October 23, after dark, without any light or precaution to warn persons passing along the road of the obstruction caused by the heap. Queen's Road is a road within the jurisdiction of the Wimbledon Urban District Council, which, although for some considerable time prior to the happening of the matters complained of it had been set out as a road by the owner of the land and used by the public, had not become repairable by the inhabitants at large, and had not been taken over by the District Council. The District Council had given notice under s. 150 of the Public Health Act, 1875, to the owner, requiring the road to be sewered, levelled, paved, metalled, flagged, channelled, and made good, and, the requirements of such notice not having been complied with, the District Council proceeded to procure the works to be carried out under their direction. With this view they entered into a contract with the defendant Iles, who is a contractor, and, in the course of carrying out his contract, he trimmed up the surface of the road, took away the grass which had been allowed to grow on the "haunches" of the road and in the waterways, and put the surface soil and grass in heaps on the side of the road. The plaintiff on the night when the accident happened had walked down the path on the south side of Queen's Road, and at the foot of the road she proceeded to cross the road in order to get over to Cromwell Road, where she lived, when she fell over one of the heaps. The District Council and Iles, the contractor, delivered separate defences. Both denied liability, but the defendant Iles paid a sum of money into court. The defendants the District Council did not bring any money into court, and they pleaded that the money paid into court by Iles was sufficient to satisfy the plaintiff's claim. The jury found that the leaving of the heaps in the position in which they were left, after dark, without a light or other warning, was an act of negligence, and they assessed as damages a sum of money less than the amount paid into court by the defendant Iles. I thereupon directed judgment to be entered for the defendant Iles. The question arises, Are the defendants the District Council entitled to have judgment entered for them? Mr. Giles, who argued the case on behalf of the District Council,

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contended that they were not liable. He said that Iles was an independent contractor employed by the District Council to do work which was in itself lawful, and that the District Council was not liable for any negligence that Iles or his men may have been guilty of in the course of the execution of the work. This question resolves itself, I think, to a large extent into a question of fact, depending upon the terms of the employment of Iles. The question is whether Iles was an independent contractor, or whether the District Council reserved the power of controlling the contractor, and of regulating the manner in which he did the work. I have looked carefully at the terms of the contract between the District Council and Iles, and I have come to the conclusion, having regard to the whole terms of the contract, that the District Council, by their surveyor, reserved powers which conferred upon them entire control over the work and the manner in which it was to be done. I do not rely upon the clauses giving power to the surveyor to require incompetent workmen to be dismissed or unsound work to be removed, because those clauses standing alone would not, I think, give the District Council such control over the work as to make the contractor their agent or servant. But the first operative clause in the contract, which requires Iles to execute all the works mentioned in the specification and the signed plans according to such explanatory drawings and instructions as may from time to time be furnished to the contractor by the surveyor, seems to me in effect to give the surveyor of the District Council complete control over the work and over the manner in which it is to be done. There is, further, a circumstance in the case, which I think is not without its bearing on this part of the case. As soon as the attention of the officers of the District Council was called to the circumstance that the plaintiff had fallen over one of the heaps, lights were ordered to be placed near the heaps at night, and lights were placed accordingly. That seems to me to shew that the District Council not only had the power, but they did in fact during the continuance of the contract exercise the power, of directing lights to be placed as a warning to the public. I have come to the conclusion that the defendants, the District Council,

having the control of the works, are liable for the negligent acts which they permitted.

But there is another ground upon which the plaintiff argued that the defendants were liable. It was contended by Lord Coleridge, who argued the case for the plaintiff, that, even if Iles was to be regarded as an independent contractor, still, upon the principle of *Hardaker* v. *Idle District Council* (1), the District Council in this case was liable. In that case of the Idle District Council the works which were being executed were being executed by the contractor of the Local Board pursuant to the powers of the same section of the Public Health Act, 1875, s. 150, as applied in the present case, and I find it difficult to draw a distinction between the two cases. *Pickard* v. *Smith* (2) is another case that closely resembles the present. In that case the defendant was the lessee of refreshment-rooms and a coal-cellar, and there was an opening for putting coals into the coal-cellar on the arrival platform at a railway station. The defendant employed a coal merchant to put coals into the cellar, and the coal merchant's servants, while putting coals into the cellar, left the hole insufficiently guarded. The plaintiff, whilst passing in the usual way out of the station, fell into the coal-cellar and was injured. It was held that the defendant was liable. The principle of the decision, I think, is this, that when a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor. *Pickard* v. *Smith* (2) is an authority for the proposition that no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be, used by persons lawfully entitled so to do. The District Council employed the contractor to do work upon the surface of a road, which they knew was being used by the public, and they must

(1) [1896] 1 Q. B. 335. (2) 10 C. B. (N.S.) 470.

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have known that the works which were to be executed would cause some obstruction to the traffic, and some danger, unless means were taken to give due warning to the public. The duty of affording protection to the public was in the circumstances incurred by the District Council, and the District Council could not avoid the obligation of that duty by entering into a contract with Iles.

The question remains, Can the defendants, the District Council, avail themselves of the separate defence which is pleaded by Iles? The two defendants might, if they had pleased, have joined in a defence of payment into court, which would have been available for both. But the District Council have chosen to put in a separate defence. I cannot see in the circumstances that they can avail themselves of the payment into court by Iles. So far as their defence is concerned, it simply amounts to a denial of liability; but in that defence they have failed. The plaintiff is therefore entitled to judgment for 50*l.* and costs. Of course, as the 50*l.* has been obtained from the other defendant Iles, the judgment against the District Council will be confined to costs only.

Judgment for the plaintiff.

Solicitor for the plaintiff: *S. A. Jones.*

Solicitor for the defendants the District Council: *W. H. Whitfield.*

Solicitor for the defendant Iles: *A. E. Copp.*

P. B. H.

BRUTTON AND ANOTHER *v.* BRANSON.

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May 27.

County Court—Practice—Notice of Statutory Defence—Statute of Frauds, s. 17 —*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4—*County Court Rules*, 1889, 1892, 1895, *Order x., r.* 18 (*a*).

In an action on a contract for the sale of goods of the value of 10*l.* the defence of the Statute of Frauds (as re-enacted by the Sale of Goods Act, 1893) is a "statutory defence" within the meaning of Order x., r. 18 (*a*), of the County Court Rules, 1889, and the defendant if he intends to rely on it must give notice of it under rule 10.

APPEAL from the City of London Court.

The action, which was commenced in the High Court, was brought to recover the sum of 20*l.* 8*s.*, the price of certain cases of whisky alleged to have been ordered by and delivered to the defendant. The defendant denied that he had ever ordered the goods. Before pleadings were delivered the action was remitted to the county court. At the trial the defendant relied upon the fact that there was no contract in writing to satisfy s. 4 of the Sale of Goods Act. It was objected by the plaintiffs that notice of intention to rely on that defence should have been given under Order x., rr. 10 and 18 (*a*), of the County Court Rules, 1889. (1) The county court judge held that the defence was not a statutory defence within the meaning of the latter rule. He accordingly overruled the objection, and non-suited the plaintiffs. The plaintiffs appealed.

Hodges, for the plaintiffs. The defence of s. 4 of the Sale of

(1) By the County Court Rules, 1889, 1892, 1895, Order x., r. 10, "Where the defendant intends to rely upon any of the grounds of defence mentioned in rules 11–20 of this order .... he shall file a notice stating thereon his name and address together with a concise statement of such grounds five clear days before the return day."

Rule 14 (*a*) deals specially with notice of the defence of any Statute of Limitations.

Rule 15 with the defence of a release under any statute relating to bankrupts.

Rule 18 (*a*): "Where in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year chapter and section of the statute, or the short title thereof, and the particular matter upon which he relies."

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Goods Act, which re-enacts s. 17 of the Statute of Frauds, is a statutory defence. By the common law persons could enforce an oral contract for the sale of goods of whatever value. But for the statute the absence of a writing would be no defence. In *Conroy* v. *Peacock* (1) it was held that in an action under the Employers' Liability Act, 1880, the defendant could not rely upon the defence that no notice of injury had been given within the time limited by the statute, unless he had given the plaintiff notice of intention to rely upon it as a statutory defence under Order x. of the County Court Rules. That case is on all fours with the present. The language of the Employers' Liability Act is "an action . . . . shall not be maintainable" unless notice of injury is given; that of the Sale of Goods Act is "a contract . . . . shall not be enforceable by action unless, &c." And in *Lewis* v. *Burrell* (2), in an action on a solicitor's bill of costs, the defence of no signed bill in accordance with the provisions of the Solicitors Act, 1843, was held to be a statutory defence within the same rules. Owing to the absence of notice in the present case that the defendant intended to rely on the defence of the statute the plaintiffs were unprepared with sufficient evidence of acceptance and receipt to take the case out of the statute. If a new trial be ordered, they may be able to prove that fact.

Russell, Q.C., and *Godwin*, for the defendant. The question whether the defence of the Statute of Frauds is a statutory defence within the County Court Rules is a question of legal history. In 1875 the new rules of the Supreme Court and those of the county courts were issued about the same time. The former for the first time required the Statute of Frauds to be specially pleaded. In the county court there are no pleadings, but Order IX. of the rules required notice to be given of certain special defences, including those of the Statute of Limitations and the Bankruptcy Act. Rule 14 of that order indeed provided that "When in any action of tort the defendant relies upon a statutory defence he shall in his statement set forth the year chapter and section of the statute on which he relies, or the short title thereof." This obviously referred to

(1) [1897] 2 Q. B. 6.

(2) (1897) 77 L. T. 626.

the defence of not guilty by statute, and to nothing else. No mention was made in those rules of the defence of the Statute of Frauds. The omission was evidently not unintentional, for had it been it would have been remedied when the new County Court Act came to be passed in 1888, and the new rules came to be made in 1889. But although in s. 82 of that Act and in Order x. of the rules there is the same express provision as in the former rules of 1875 with respect to the Statute of Limitations and the Bankruptcy Act, the Statute of Frauds still remains unmentioned. The inference is that it was not intended that notice should be given of intention to rely on the latter defence. Rule 18 (*a*) of that order, upon which the plaintiff here relies, indeed repeats the language of Order IX., r. 14, of the former rules as to a "statutory defence," with the addition of certain immaterial words and the substitution of the words, "where in any action" for "where in any action of tort." But it is more probable that the omission of the words "of tort" was accidental than that it was intended to give a wholly new meaning to the words "statutory defence." It cannot have been intended to apply to the Statute of Frauds; for, if it were, a notice that the defendant intended to rely on the contract not being in writing would be a bad notice, inasmuch as it specified neither the short title nor the year, chapter, and section, though it clearly would be a sufficient plea of the statute for the purposes of the Supreme Court. If the other side are right as to the meaning of "statutory defence," where is any line to be drawn? The words will apply not only to s. 4 of the Sale of Goods Act, but to the whole of the Act, at all events, so far as it has modified the common law. Further, the Statute of Frauds is not only not a "statutory defence" within the rules —it is not matter of defence at all. The form of the contract is part of the plaintiffs' proof. Under the old rules of pleading of Hilary Term, 1834, which provided that "in all actions of assumpsit . . . . the plea of non-assumpsit shall operate only as a denial in fact of the express contract or promise," it was held that the Statute of Frauds need not be specially pleaded, and that by the plea of non-assumpsit the existence of a writing was put in issue whether the case fell under

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s. 4: *Buttemere* v. *Hayes* (1); or under s. 17: *Leaf* v. *Tuton*. (2)

Hodges, in reply. The rules of Hilary Term, 1834, required only "matters in confession and avoidance" to be specially pleaded. There are matters which, although not in confession and avoidance, are still matters of defence, and amongst them comes the Statute of Frauds.

WILLS J. I am of opinion that in this case the county court judge was wrong. We are much indebted to counsel upon both sides for their arguments; but no amount of learned researches into the history of these rules will assist us to the meaning of the words which we have to construe. The words "statutory defence" are not words of art. It seems to me to be plain that rule 18 (*a*) was intended to apply to actions of contract. It has been contended that even if it does, still it does not cover the Statute of Frauds, on the ground that the non-existence of a writing to satisfy that statute is not matter of defence. I cannot agree. It has always been treated by lawyers as a matter of defence. Then, if it is a defence, it is a statutory defence, for the defence is one which has its origin only in a statute. I will not attempt to define the words "statutory defence," or to say what they include and what they do not. But I cannot give any definition which would not include the defence of the Statute of Frauds. In the Supreme Court Rules of 1875 the Statute of Frauds was clearly treated as a matter of special defence which did not arise on a mere denial of the contract. No doubt the regulations as to pleading laid down in the Supreme Court Rules have not been completely followed in the County Court Rules; for instance, the illegality of a contract must be specially pleaded in the High Court, but no notice of such a defence need be given in the county court. But that cannot affect the plain meaning of the words "statutory defence," which, as I have said, I cannot interpret otherwise than so as to include the defence here set up.

CHANNELL J. I am of the same opinion. I confess I cannot conceive any meaning which could be given to the words

(1) (1839) 5 M. & W. 456. (2) (1842) 10 M. & W. 393.

"statutory defence" which would not include the defence of the Statute of Frauds. There is no guide to their meaning to be found outside the words themselves.

Order for new trial.

Solicitors for plaintiffs: *Irvine & Borrowman.*
Solicitors for defendant: *Batchelor & Cousins.*

J. F. C.

BARNES AND ANOTHER *v.* GLENTON AND OTHERS.

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April 29; *May* 23.

Limitations, Statute of—Borrower and Lender—Money charged upon Land—Payment of Interest by Co-debtor—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*The Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*The Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14—*Implied Repeal.*

The defendants, trustees of a will, in 1882 borrowed from the plaintiffs a sum of money, the repayment of which was secured in the following manner. The defendants, being entitled as beneficial owners to certain mortgages of land, procured the person in whom the legal estate of the mortgages was vested to assign them to the plaintiffs by deeds of assignment to which the defendants were not parties. Then by a further deed to which both the defendants and plaintiffs were parties it was agreed that the money advanced by the plaintiffs should constitute a first charge upon the principal and interest to be received or recovered by the plaintiffs by virtue of the mortgages so assigned, and that the plaintiffs should not realize the mortgages without first giving the defendants the opportunity of paying off the amount advanced to them. This deed contained no express covenant by the defendants to repay the plaintiffs their advance. Immediately after the execution of this deed, in 1882, L., one of the defendants, retired from the trust. Interest was paid to the plaintiffs by the remaining trustees down to 1896. In April, 1897, the plaintiffs brought their action to recover the balance of their advance then remaining unpaid. L. contended that, as there was no covenant to repay the advance, the debt was a simple contract debt within the statute of 21 Jac. 1, c. 16, that the provisions of s. 14 of the Mercantile Law Amendment Act, 1856, prevented the payment of interest by his co-trustees from keeping the debt alive against him, and that consequently as against him the plaintiffs' claim was barred:—

Held, that the money advanced by the plaintiffs was "money secured by mortgage" and "charged upon or payable out of land" within the meaning of s. 8 of the Real Property Limitation Act, 1874; that that Act and not the statute of 21 Jac. 1, applied; that L. was not within the protection of the Mercantile Law Amendment Act, 1856; and that the plaintiffs' claim was not barred as against him.

FURTHER CONSIDERATION before Lord Russell of Killowen C.J.

One Lewis Glenton died in 1873, having appointed the

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defendants Maria Glenton, Angelo Lewis, and Godfrey Saunders trustees of his will. A Mr. Barber had acted as solicitor for Lewis Glenton, and certain mortgages of real property for sums amounting in the aggregate to 3095*l.* 15*s.* 5*d.* were vested in him as trustee for Lewis Glenton. Barber died in 1881, having appointed his widow devisee and executrix of his will. At that date Lewis Glenton's estate was indebted to him in a considerable sum. In 1882 the defendants, being desirous of paying off the debt upon their estate, arranged to borrow from the plaintiffs a sum of 1650*l.* upon the security of the mortgages which had been so held in trust by Barber. The defendants procured Mrs. Barber, in whom the mortgages were then vested, to assign them to the plaintiffs by several deeds bearing date September 9, 1882. To that deed the defendants were not parties. By a further deed of even date made between Mrs. Barber of the first part, the defendants of the second part, and the plaintiffs of the third part, reciting the transfer of the mortgages by Mrs. Barber to the plaintiffs, that she was equitably entitled to the said mortgages to the extent of the debt due to her, and that the defendants were entitled to the residue, and reciting the advance of 1650*l.* by the plaintiffs, it was witnessed that it was agreed that the money so advanced with interest thereon should until repayment be "a first charge upon all principal money and interest to be received or recovered" by the plaintiffs "by virtue of the several mortgage securities transferred to them." The deed further provided that the plaintiffs might call in and realize the principal moneys secured by the several mortgage securities (namely, the 3095*l.* 15*s.* 5*d.*), provided always that no steps should be taken against the mortgaged properties or the persons entitled to redeem the same without the consent of the defendants or the survivors of them or other the trustees for the time being of the will of Lewis Glenton, such consent only to be refused in case the trustees should within three months after application for such consent pay off all the moneys due to the plaintiffs. The deed contained no express covenant by the defendants to repay the plaintiffs the money advanced. Immediately after the execution of the deed, in September, 1882, the defendant Lewis

retired from the trust. The other two defendants as the surviving trustees continued to pay to the plaintiffs interest upon the money advanced down to March, 1896. In April, 1897, there was due from the defendants to the plaintiffs in respect of capital and interest a sum of 1368*l.* 15*s.* 7*d.*, to recover which sum this action was brought. The defendants pleaded that the intention of the parties was that the plaintiffs should look to the mortgaged properties alone as their security, and that the defendants were not to be personally liable to repay the money advanced. The defendant Lewis further pleaded that as against him the claim was barred by the joint effect of the Statute of Limitations, 21 Jac. 1, c. 16, and of s. 14 of the Mercantile Law Amendment Act.

Dickens, Q.C., and *H. Manisty*, for the plaintiffs. The fact that a mortgage deed does not contain an express covenant to repay the money advanced does not exclude an implied personal obligation to repay it: *Yates* v. *Aston*. (1) Then as to the defence of the defendant Lewis. The case falls within the words of s. 8 of the Real Property Limitation Act, 1874 (2), the action being brought to recover a sum of money secured by mortgage and charged upon or payable out of land. In *Sutton* v. *Sutton* (3) it was held that that section applies, not only to an action against the land, but also to an action on the personal covenant in the mortgage deed. And not only does it apply to the personal remedy where there is a covenant to pay, but also where, in the absence of a covenant, there is only

(1) (1843) 4 Q. B. 182.

(2) By s. 8 of the Real Property Limitation Act, 1874, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payment or acknowledgments, if more than one, was given."

(3) (1882) 22 Ch. D. 511.

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an implied obligation to pay: see per Bowen L.J. (1) Then, if the section applies, the defendant Lewis is not protected by s. 14 of the Mercantile Law Amendment Act, 1856, from the effect of payment of interest by his co-trustees. For that section is confined in its operation to the statutes therein named, and of those statutes the 3 & 4 Will. 4, c. 27 (with which the Act of 1874 is to be read), is not one: *In re Frisby*. (2)

C. J. Edwards, and *A. Roscoe*, for the defendant Glenton. Whether there is an implied personal obligation to pay is in each case a question of fact.

C. A. Russell, Q.C., and *Rufus Isaacs*, for the defendant Lewis. The money due to the plaintiffs is not money secured by mortgage or otherwise charged upon land within s. 8 of the Act of 1874. It is not secured upon the subject-matter of the mortgages, but only on the proceeds of those mortgages when recovered. No proceedings could be taken by the plaintiffs against the land to recover the 1650*l*. Then, if this money is not within that section, the statute of 21 Jac. 1 applies, and Lewis is protected by s. 14 of the Mercantile Law Amendment Act. Secondly, even if the case falls within the language of the Act of 1874, it also falls within the statute of James. And both applying, the latter must prevail. A simple contract debt as this is, whether secured by mortgage or not, must be sued for within six years. The two Acts are perfectly consistent, and the later cannot be taken to repeal the earlier. The Act of 1874 does not say that an action may be brought at any time within twelve years: it only says that no action shall be brought after that period. The object of that statute was not to enlarge rights of action, but to cut down the period within which an action might be brought from twenty years to twelve.

Manisty, in reply. The statute of James cannot be held to override the Act of 1874, for under the latter Act the charge on the real estate clearly keeps the debt alive for twelve years for the purposes of a real action against the land, and it must equally do so for the purposes of a personal action on the implied undertaking to pay.

Cur. adv. vult.

(1) 22 Ch. D. 511, at p. 520. (2) (1889) 43 Ch. D. 106.

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LORD RUSSELL of KILLOWEN C.J. The claim of the plaintiffs as indorsed on the writ is "for money lent due under a deed dated September 9, 1882." The defendants were the trustees of the will of Lewis Glenton, who died in 1873, the defendant Maria Glenton, widow of the testator, being a beneficiary under that will. The material facts are these. One Fairless Barber had acted as solicitor for the testator and for the defendants as trustees, and certain mortgages for sums amounting to 3095*l.* 15*s.* 5*d.* had been transferred to Barber as trustee for Lewis Glenton. Fairless Barber died in 1881, and those mortgages thereupon became vested in Maria Barber, his widow, who was devisee under, and executrix of, his will. At the time of Barber's death the estate of Lewis Glenton was indebted to him in a considerable sum for services rendered by him as solicitor to Lewis Glenton, and to the trustees, and also for money advanced. The defendants, as trustees of Lewis Glenton's estate, with the object of paying off the moneys so due to Fairless Barber's estate, and for other purposes in connection with their trust, entered into negotiations with the plaintiffs for the advance of a sum of 1650*l.* upon the security of the mortgages before mentioned. These negotiations resulted in the plaintiffs' agreeing to make the advance. The transaction was carried out thus: by four deeds executed September 9, 1882, Maria Barber assigned the mortgages in question to the plaintiffs. The only parties to these deeds were Maria Barber and the defendants. They contain no covenant for repayment by Maria Barber of the moneys advanced; indeed, it was expressly agreed that she should come under no personal liability. On the same September 9, 1882, a deed or declaration of trust was afterwards executed, to which Maria Barber, the defendants (not described as trustees), and the plaintiffs were parties. It recited the four transfers already referred to; that, as to the principal moneys, they belonged in equity as to part to Maria Barber, and as to the balance to the defendants; that the plaintiffs had at the request of the defendants advanced to them 1650*l.*, part of which had been applied in payment of the portion of the moneys, secured by the transferred mortgages, which belonged to Maria Barber,

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and the balance paid to the defendants; and that it had been agreed that the repayment of such moneys and interest should be secured in the manner thereinafter mentioned. The deed then provided—(1.) that the moneys advanced by the plaintiffs should be a first charge upon the transferred mortgage securities; (2.) that the plaintiffs might either allow the moneys secured by the several mortgages to remain as invested, or might call them in and realize them, and as to any money received for interest should, after retaining interest on their advance, pay any balance to the defendants, or the survivor or survivors, or other the trustees for the time being of Lewis Glenton's will, but no step was to be taken against the mortgaged properties or the persons entitled to redeem without the consent in writing of the defendants or other the trustees of Lewis Glenton, but such consent was only to be refused in case the trustees within three months after application made to them for such consent paid off the claim of the plaintiffs. Subject to the claim of the plaintiffs the mortgage securities were dealt with as the property of the defendants or other the trustees of Lewis Glenton. The deed contained no express covenant by the defendants to repay the plaintiffs their advance. Immediately after the execution of this deed the defendant Lewis retired from the position of trustee. Interest was paid from time to time up to March, 1896. After crediting the sum of 352*l.* 0*s.* 9*d.*, received on account of principal, the sum of 1368*l.* 15*s.* 7*d.* for principal and interest remained unpaid at the date of the writ, April 12, 1897.

In this state of facts two points were raised by the defendants. The first was that the plaintiffs had advanced the moneys solely on the security of the mortgages, and that there was no personal liability on any of the defendants to repay. [The Chief Justice proceeded to discuss the evidence, and came to the conclusion that the defendants had undertaken a personal liability.]

The other point applied to the case of the defendant Lewis only. It was contended for him that the six years' limitation of actions applied and was a defence; that the liability here, if any, was for a simple contract debt within the meaning of the statute of 21 Jac. 1, c. 16, s. 3, and, as Lewis had had nothing

to do with the trust since 1882, he was within the protection of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 14, and that, therefore, the payments made by his co-contractors or co-debtors, the other defendants, did not keep the debt alive as against him. The plaintiffs, on the other hand, argued that it was not within 21 Jac. 1, c. 16, but that it was an action to recover a sum of money secured by, or charged upon, or payable out of land, within the meaning of s. 8 of the Real Property Limitation Act, 1874, and that the payments of interest to the plaintiffs by his former co-trustees from time to time kept the claim alive against him. It was admitted on his behalf that, if the plaintiffs' contention was correct, he could not claim the benefit of s. 14 of the Mercantile Law Amendment Act, 1856: see *In re Frisby*. (1) The question then is whether the Real Property Limitation Act, 1874, governs this case. Sect. 8 is as follows: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage judgment or lien or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given." In my opinion this section applies. By the deed now sued on the money advanced is made a first charge on all moneys recovered by virtue of the mortgages, and the plaintiffs have the power of foreclosure subject only to the defendants' consent, which they could withhold only in the event of their preferring to pay off the debt. Therefore, having regard to the terms of this deed, I think this money was secured by mortgage

(1) 43 Ch. D. 106.

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Lord Russell C.J.

and was charged upon and was payable out of land within the meaning of s. 8.

It was argued in *In re Frisby* (1) that the section applies only to actions against a mortgagor, and Bowen L.J. appears to have held that view; but Cotton L.J. said he could find nothing in the section pointing at such a limitation. In my view, however, it is not necessary in this case to express an opinion on the point, for I think the transaction between these parties amounted at least to an equitable mortgage, and the defendants are practically in the position of mortgagors. Sect. 8, therefore, of the Act of 1874 applies to this case; and, if so, the defendant Lewis is not entitled to the benefit of s. 14 of the Mercantile Law Amendment Act, 1856. It follows that the payments made by the co-trustees of Lewis are sufficient, according to the decision in *In re Frisby* (1), to keep the claim alive against him.

It was also contended on behalf of Lewis that if the two sections are read together, 21 Jac. 1, c. 16, would govern all cases where there was a contract without specialty, and that s. 8 of the Act of 1874 applied only where there was a specialty. It was argued that here there was no specialty contract, and therefore the case fell within 21 Jac. 1, c. 16, and Lewis was consequently entitled to the benefit of the Mercantile Law Amendment Act, 1856. I do not agree with this contention. I think the effect of this s. 8 is to take out of 21 Jac. 1, c. 16, for all purposes all actions of debt secured by mortgage or otherwise charged upon or payable out of land. But further, s. 8 expressly included cases of security by lien which are not often effected by specialty contract. There must, therefore, also be judgment against the defendant Lewis.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Maudes & Tunnicliffe.*
Solicitors for the defendant Glenton: *Walker, Son & Field.*
Solicitors for the defendant Lewis: *Calkin, Lewis & Stokes.*

(1) 43 Ch. D. 106.

J. F. C.

THE QUEEN *v.* JUSTICES OF STAFFORDSHIRE AND ANOTHER.

1898
May 25.

Licensing Acts—Refusal to renew Licence—Appeal—Appearance of Licensing Justices in Opposition to Appeal—Power of Quarter Sessions to give Costs against Justices so Opposing—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 29.

Where, upon an appeal to quarter sessions against a refusal by licensing justices to renew a licence, the licensing justices appear and oppose the renewal, the quarter sessions have no power under s. 27 of the Alehouse Act, 1828, to order the licensing justices to pay costs to the appellant in the event of the appeal being allowed.

RULE for certiorari to the quarter sessions of the county of Stafford.

During the year 1897 the licensing justices of the borough of West Bromwich, in the county of Stafford, having received numerous complaints with respect to the condition of various licensed houses, personally made an inspection of all the licensed premises in the borough. In the course of their inspection they came upon a beerhouse called "The Duke of Wellington," which was in a dilapidated condition, and required a considerable sum to be laid out in repairs in order to raise it to the annual value of 15*l.*, that being the value necessary to qualify it for a licence. The occupier, one Thomas Longhurst, was informed that it must be put into a proper state of repair before the Brewster Sessions. The house having been allowed to remain in the same dilapidated state when the Brewster Sessions came on the justices postponed the renewal of the licence to the adjourned licensing day, and instructed the superintendent of police to give Longhurst notice that objection was taken to the renewal of his licence. At the adjourned licensing day a Mr. Eayres was called by the superintendent of police, who proved that the premises were not worth more than 13*l.* a year. Upon that evidence the justices held that the house was not qualified as by law required, and refused the renewal of the licence. Longhurst served notice of appeal upon the licensing justices under s. 27 of the Alehouse Act,

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1828. The superintendent of police abandoned his opposition, and gave the appellant notice that he would not contest the appeal. The appeal came on for hearing at the quarter sessions in November. The licensing justices were the only respondents; they were represented by counsel, who stated that the justices appeared, not as litigants, but only for the purpose of informing the mind of the Court as to the ground of the refusal to renew. The only witness called on behalf of the respondent justices was Mr. Eayres. Three witnesses were called by the appellant, who stated that the value of the house was above 15*l*. The respondents' counsel declined to cross-examine them or to reply on the evidence.

The Court allowed the appeal, and, being of opinion that the respondent justices had made themselves parties to the appeal, they made an order that the respondents should pay the appellant's costs. The respondents then applied for and obtained a rule for a certiorari to bring up the order of the quarter sessions ordering them to pay costs to the appellant to be quashed.

Disturnal, for the appellant, shewed cause. The quarter sessions had jurisdiction to make the order. Sect. 27 of the Alehouse Act, 1828, which is the section under which the right of appeal against refusals to renew or transfer licences exists, expressly provides that in the matter of the appeal the Court "shall make such order, with or without costs, as to the said Court shall seem meet." That gives the Court a discretion which in the present case has been exercised in the appellant's favour. No doubt they cannot give costs against a person who was not a party to the appeal. But here the respondents appeared by counsel and called evidence, and the Court were justified in holding that they had made themselves parties. That it is competent for the licensing justices to make themselves parties seems clear from the judgment of A. L. Smith L.J. in *Reg.* v. *Justices of London* (1), where he says that, "Upon this notice being given the licensing justices have three courses open to them. They need not go to quarter sessions at all. They may go there in their character of justices, as distinguished

(1) [1895] 1 Q. B. 616, at p. 634.

from that of litigant parties to the appeal. They may also go there as respondents, i.e. litigant parties, to the appeal, if the appellant treats them as such and they accept that position." Whether the justices appear in the latter character or not is a question of fact. The case of *Boulter* v. *Kent Justices* (1) is not opposed to this view, for there the objector below did not appear on the appeal. It does not decide that if he had appeared he might not have been ordered to pay costs.

Avory, for the respondents, in support of the rule. Even if licensing justices could make themselves parties to an appeal, they did not do so here: they abstained from cross-examining the respondents' witnesses, and they declined to reply. But that is immaterial, for under no circumstances can licensing justices make themselves parties, however strenuously they may oppose the appeal. The dictum of Smith L.J. in *Reg.* v. *Justices of London* (2) is wrong. For *Boulter* v. *Kent Justices* (1) decides that on such an appeal there is no litigation, and where there is no litigation there can be no parties to it. "There is," said Lord Herschell (3), "in truth, no lis, no controversy inter partes, and no decision in favour of one of them and against the other, unless indeed the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large." The language of s. 27 of the Act of 1828, that upon the appeal the Court may make such order as they think fit, "with or without costs," may well be satisfied without having reference to licensing appeals. For that section provided for an appeal against "any act of any justice done in or concerning the execution of this Act," and various sections of the Act created offences and provided for the recovery of penalties for those offences. The power of giving costs to an appellant under s. 27 may well be understood to apply to the cases of appeals against convictions under the penal sections, in which cases the prosecutors would necessarily be treated as litigant parties whether they appeared on the appeal or not:

(1) [1897] A. C. 556. (2) [1895] 1 Q. B. 616.
(3) [1897] A. C. 556, at p. 569.

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Reg. v. *Purdey.* (1) If the contention of the other side is right it would necessarily follow that in every case, in which an appeal is brought against a refusal to renew a licence, the appeal will be a mere farce, and the appellant will, as a matter of course, obtain his licence. For at the quarter sessions the practice is that the respondent begins, and if no evidence is tendered by the respondent the appellant is entitled of right to have the appeal allowed. But if respondents can only produce such evidence at the risk of having to pay costs, it is clear that they will never do so.

WILLS J. I am of opinion that this rule for a certiorari should be made absolute. Mr. Disturnal's contention comes to this, that although when the question of the renewal of a licence is before the licensing committee in the first instance, an objector may appear and object to the renewal without subjecting himself to the risk of having to pay costs in the event of his failing to support his objection, where the renewal of the licence has been refused, and an appeal has been brought against that refusal, the licensing justices cannot appear on the appeal and fight the question as to whether their refusal was right except at the risk of having to pay costs, notwithstanding the fact that if they do not so appear and support their decision the appellant will have it all his own way. It seems to me to be most improbable that the Legislature can have intended such a result. The interest of the public in having an effectual investigation into the circumstances which justify or render improper the renewal of a licence are just as great on the hearing of the appeal as on the hearing of the original application. And yet, if Mr. Disturnal's contention is right, those interests will practically have to be disregarded, for persons will not be found to come forward to protect them if they are to do so at the risk of having to pay costs. The licensing justices are the only persons on whom, under s. 27 of the Act of 1828, notice of the intended appeal is to be served. They are therefore the only persons who necessarily know that any appeal is going to be brought. Under those circumstances,

(1) (1864) 5 B. & S. 909.

can it be supposed that they, the only persons who have any opportunity of appearing, are not to appear and oppose the appeal except at the risk of paying costs if they are unsuccessful? It seems to me sufficient to refer to the passage in Lord Herschell's judgment in *Boulter* v. *Kent Justices* (1), in which he enumerates the considerations which led him to the conclusion that at the hearing of an objection to the renewal of a licence before a licensing committee there is no litigation, and there are no parties, and therefore no person against whom costs can be ordered. Those considerations, to my mind, apply with equal force to the investigation which takes place where there is an appeal. That being so, there is no litigation upon the appeal, and consequently no power to give costs against the justices who oppose it, however active their opposition may be. But then it is said that that cannot be so because there is express power given by s. 27 to the quarter sessions to "make such order (in the matter of the appeal) with or without costs as to the said Court shall seem meet"—that is to say, they are empowered to grant costs to the appellant where he is successful. But it must be borne in mind that, as the Act of 1828 originally stood, it contained a number of sections creating offences, and the right of appeal given by s. 27 applied as well to convictions under those sections as to refusals to renew or transfer licences. Therefore, the power of giving costs may well be satisfied by supposing it to refer to appeals against convictions, in which cases there would be a litigation, and the prosecutors would be parties against whom, upon ordinary principles, costs might be awarded. But upon appeals against refusals to renew or transfer licences there is, as I have said, no litigation, and there are no parties. The foundation of the reasoning in *Reg.* v. *Justices of London* (2) is cut away by the decision in *Boulter* v. *Kent Justices.* (3) I may add that I am fortified in the view which I have taken in this case by the fact that in s. 29 there is an express provision that, where a justice whose decision is appealed from appears on the appeal, the appellant shall, in the event of the appeal being dismissed, pay

(1) [1897] A. C. 556, at p. 569. (2) [1895] 1 Q. B. 616.
(3) [1897] A. C. 556.

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costs to the justice, in which case the justice gets his costs, not because he is a party to the appeal, but by virtue of the express words of the section; but there is no corresponding provision that in the event of the appeal being allowed the justice is to pay costs to the appellant.

CHANNELL J. I am of the same opinion. The power given by s. 27 to award costs is one which can only be exercised where there is a party to the litigation against whom costs can be awarded. There is no ground for saying that in every appeal there must be a party against whom an order to pay costs may be made. The case of *Boulter* v. *Kent Justices* (1) seems to me to decide that a person who appears and objects to a licence being renewed does not thereby make himself a party; from which it follows that if the licensing justices appear on the appeal to support their decision, no order for costs can be made against them in the event of the appeal being allowed.

Rule absolute for a certiorari.

Solicitor for respondents: *A. S. Doyle.*

Solicitors for appellant: *Murr & Rusby, for Sharpe, West Bromwich.*

(1) [1897] A. C. 556.

J. F. C.

1898
May 5.

HORTON & SON, LIMITED, APPELLANTS *v.* THE ASSESSMENT COMMITTEE OF THE WALSALL POOR LAW UNION AND THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF DARLASTON, RESPONDENTS.

Poor-rate—Procedure—Appeal—Net Annual Value—Gross estimated Rental—Evidence—Admissibility—The Poor Rate Act, 1801 (41 *Geo.* 3, *c.* 23), *s.* 1—*The Parochial Assessments Act*, 1836 (6 *& 7 Will.* 4, *c.* 96), *s.* 1.

Where, on objection being made to a poor-rate, the rating authority has fixed the amount of the gross estimated rental of the premises rated appearing in the rate-book, and the ratepayer appeals to quarter sessions against the rate, the rating authority is bound by the amount of the gross estimated rental so fixed, and is not entitled to call evidence before the Court of Quarter Sessions to shew that the gross estimated rental has been fixed too low.

UPON the hearing of an appeal by the Court of Quarter Sessions for the county of Stafford against a poor-rate, whereby the appellants were rated in respect of premises known as the Alma Works, occupied by the appellants, and situate in the parish of Darlaston, and which assessment and rate appeared in the rate-book, which was in accordance with the valuation list in force in the parish, as follows,

No. of Assessment.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Estimated Extent.	Gross estimated Rental.	Rateable Value.	Amount of Rate in £.	Amount of Rate.
						£	£		£
1397	Horton & Son, Limited.	Horton & Son, Limited.	"Alma Works," land, buildings, machinery, fixed plant, and premises.	Station Street.		750	600	2*s.*	60

it was ordered that the rateable value, as appearing in the rate, be reduced to 415*l.*, and the rate-book amended accordingly, and the appeal allowed, subject to a case for the opinion of the Divisional Court, in which the following facts were stated.

The appellants, Messrs. Horton & Son, Limited, were the

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owners and occupiers of the premises, which comprised an area of 4A. 2R. 10P. of land, upon which were erected buildings, machinery, and fixed plant.

Upon objection by the appellants to the Assessment Committee of the Walsall Union, the gross estimated rental was reduced to 725*l.*, and the rateable value was reduced to 544*l.*

The appellants appealed against the rate to the Court of Quarter Sessions. The grounds of appeal were—

(1.) That the principle upon which the annual value of the premises was estimated was erroneous.

(2.) That the appellants were overrated in respect of the premises.

(3.) That the gross value of the premises, as stated in the valuation list, and upon which the rate was based, was too much.

(4.) That the net annual value of the premises, as stated in the valuation list, was greater than the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, necessary to maintain the premises in a state to command the rent.

(5.) That in the valuation of the premises, machinery, stock-in-trade, utensils, and other personal property not liable to be rated for the purposes of poor-rate, had been included.

On the hearing of the appeal the appellants accepted the gross estimated rental of 725*l.* as correct, and claimed, in order to arrive at the correct net annual value of the premises, to deduct from the 725*l.* the sum of 310*l.* at the least, which the appellants alleged represented the average annual expenditure upon repairs, insurance, and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year.

The respondents (having since the date of their decision on the objection made by the appellants made a resurvey of the premises, which were in the same state as when the rate was made) admitted that the annual average sum of 310*l.* at the least was required for insurance, repairs, and other expenses

necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year, but they stated that the rent was in fact more than that shewn in the rate as the gross annual value.

The respondents, for the purpose of satisfying the Court that the true net annual or rateable value of the premises, upon which the rate was made, according to 6 & 7 Will. 4, c. 96, s. 1, was not less than 544*l.*, proposed to prove that the gross estimated rental and rateable value were in fact understated in the rate-book and valuation list, and for that purpose proposed to give evidence of the total present structural value of the buildings, and such of the plant and machinery as was properly to be taken into account as enhancing the annual value, and to take a percentage upon the structural value, which would give the true rateable value, and to the true rateable value, arrived at as aforesaid, the respondents agreed that the sum of not less than 310*l.* should be added to arrive at the true gross estimated rental.

The respondents did not claim that either the "gross estimated rental" of 725*l.*, or the "rateable value" of 544*l.*, should be increased, but that the real point at issue was the net annual or rateable value of the premises, and they claimed the right to call the evidence before mentioned, to shew that the rate of 54*l.* 8*s.* (being a rate of 2*s.* in the pound on the reduced rateable value of 544*l.*) was not made upon a higher sum than the true net annual value of the hereditaments.

The respondents further contended that, in manufactories where the wear and tear of buildings and plant is great, it is impracticable to enter a high gross estimated rental in the poor-rate. And that legislation is required limiting the deduction from the gross (or the addition to the rateable), as is done in the metropolis, the deduction of 310*l.* claimed by the appellants being in excess of the maximum statutable allowance under the Metropolitan Valuation Act.

The appellants contended that the respondents were concluded by the amount appearing in the valuation list as "gross estimated rental," and that, as that amount was admitted by the appellants, the only question which the Court had power

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to decide was, what were the proper deductions, and the amount thereof, to be made from the gross estimated rental, in order to arrive at the rateable value?

The respondents contended that, specifically disclaiming, as they did, any application to increase the gross estimated rental, they were entitled to adduce evidence which would shew that the true "net annual or rateable value" of the premises had not been exceeded in the assessment appealed against, notwithstanding that they would thereby incidentally shew that the "gross estimated rental" had been estimated at too low a figure.

The Court of Quarter Sessions were of opinion that the evidence offered by the respondents was, in the circumstances, and having regard to the admissions of the respondents, inadmissible, and they accordingly rejected the same, and ordered the "rateable value" to be reduced as aforesaid, and allowed the appeal.

The question for the opinion of the High Court was,—

Whether, in the circumstances, and having regard to the admissions of the respondents, the Court of Quarter Sessions rightly rejected the evidence.

Alfred Young (*G. C. Lewis* with him), for the respondents. (1) The Court of Quarter Sessions ought to have heard the evidence, which the respondents tendered for the purpose of proving that the gross estimated rental had been fixed too low. The material question under s. 1 of the Parochial Assessments Act, 1836 (2) is as to the "net annual value," which, as appears

(1) Messrs. Horton & Son, who appealed to Quarter Sessions under the Poor Relief Act, 1743 (17 Geo. 2, c. 38, s. 4), are referred to throughout as appellants, and the rating authority as respondents.

(2) 6 & 7 Will 4, c. 96. By s. 1, "No rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent; provided always that nothing herein

from the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 14, is synonymous with the "annual rateable value." In order to ascertain what the net annual value really is, it is material to ascertain whether the gross estimated value has been properly fixed or not. The sessions could alter the amount of the estimated value under the Poor Rate Act, 1801, s. 1 (1), and the evidence tendered would be material in order to satisfy them as to what, if any, alteration they might think it right to make. [He referred to *Reg.* v. *Fordham* (*Inhabitants*) (2); *Reg.* v. *Wells* (3); *Reg.* v. *London School Board* (4); *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee.* (5)]

A. T. Lawrence, Q.C. (*Disturnal* with him), for the appellants, Horton & Son, Limited. The decision of the Court of quarter sessions was right, and the evidence was rightly rejected. The assessment committee cannot go behind the figures which they themselves have fixed in making the rate: Union Assessment Committee Act, 1862, s. 20. They are estopped from disputing the correctness of the figures. All their jurisdiction is conferred by statute, and there is nothing to be found in any of the statutes which has the effect of enabling them to make such an alteration as is suggested. The opinions expressed by Day and Phillimore JJ. in *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee* (5) support Messrs. Horton & Son's contention.

Alfred Young replied.

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contained shall be construed to alter or affect the principles, or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

(1) 41 Geo. 3, c. 23. By s. 1, "Upon all appeals from any rate or assessment made for the relief of the poor of any parish, ... the court of general or Quarter Sessions of the peace shall, and such court is hereby authorized and required, in all cases where they shall see just cause to give relief, to amend such rate or assessment, either by inserting therein or striking out the name or names of any person or persons, or by altering the sum or sums therein charged on any person or persons, or in any other manner which the said court shall think necessary for giving such relief, and without quashing or wholly setting aside such rate or assessment."

(2) (1839) 11 A. & E. 73.

(3) (1867) L. R. 2 Q. B. 542.

(4) (1886) 17 Q. B. D. 738.

(5) (1898) 14 Times Rep. 347; 62 J. P. 343.

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WILLS J. This is a case in which the amount at stake is trumpery; but undoubtedly the question which has been raised is one of considerable importance in the general administration of the law as regards rating. I have felt it to be a case in which there is a good deal to be said on both sides, but I have come to the conclusion, and I think I shall be able to give satisfactory reasons for it, that the view taken by the Court of Quarter Sessions was right. It is quite true that the real substantial subject in dispute, and the thing that in ninety-nine cases out of a hundred is the only one that is of the slightest consequence to the parties, is what the net rateable value ought to stand at. I am not in the least impressed by the many hardships and injustices which have been dwelt upon, and least of all am I impressed by the argument that Messrs. Horton & Son, if the decision of the Court were against them, would have lost an additional chance of disturbing this rate on the ground of inequality in the assessment of the gross rateable value. In every case in which there is one appellant who obtains relief, and whose figures are altered, some of the rest of the ratepayers lose the privilege of attacking the rate on a new basis which is established by these altered figures, and the man who lives next door to the successful appellant, and whose house may be exactly the same as his, and worth exactly the same, may lose, and does lose, in such a case, the privilege of saying, in respect of one rate and of one rate only, "You have rated my neighbour, who has got exactly the same house as myself, at half as much as you have rated me at, and therefore there is inequality." That is inevitable, and I confess that that hardship, which has been pressed upon us, does not affect my mind in the least. But what I am impressed with is this, that the whole of this apparatus for rating, and for appeals in respect of rating, is statutory, and it is within the compass of the statutes alone that we can say what ought to be done. There are very elaborate provisions made for enabling the rating authorities to do the best they can to arrive at a just conclusion, and to get their figures right; and there are also elaborate provisions made for the appellants, which by virtue of 41 Geo. 3, c. 23, s. 1, may lead undoubtedly to many of the figures in the rate-book

being subject to alteration upon an appeal; but there is, as it seems to me, no machinery by which the correct figure for the estimated gross value can be increased after the rate is once made up. It is an alteration of such a character that the desire to obtain it certainly will not lead to an appeal. No appellant will claim to be rated higher than he is rated. It is possible that a man having a passion for theoretical equality might do so, and if one could conceive such a case, then it might fall within the section, which would give power to amend in such a case as that by raising the figure. But I do not think the parish rating authorities can ever claim the benefit of that section to get the figure amended by way of increase. It is the section which enables the quarter sessions to amend instead of quashing. The rating authorities, I think, where there is an appeal against the rate, although it involves a question as to the gross rateable value, cannot get the figure altered in their favour, under that section, because, as it seems to me, the power to give relief, and in favour of saving the rate from being quashed, only applies in cases in which, but for the Act of Parliament, the rate would have been liable to be quashed. Therefore it does not apply in a case in which there is either no appeal against the gross rateable value, or in which, there having been an appeal, it has been dropped, and no question arises in respect of it.

Therefore there was no power, under the circumstances of this case, to alter that figure. Therefore that figure in the rate-book stands, and it would be wrong to say that the magistrates ought to embark upon an inquiry, which might lead to a second figure, namely the net rateable value, being altered in such a way that the statutory relations between these two figures of gross and net would be violated. Whatever the quarter sessions may do, they must see that the proper deductions are made, and bring the net rateable value into harmonious relation with the initial figure.

This view is in consonance with the view expressed in the case decided by Day and Phillimore JJ., of *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee.* (1) I do not

(1) 14 Times Rep. 347; 62 J. P. 343.

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WILLS J.

take that case to be really binding upon us, because in this case there is a power of appeal, and I do not think, under those circumstances, that we can be bound to follow a judgment, if we do not agree with it, and if we think that it is clearly wrong, and especially a judgment which was given with respect to this matter without its being seriously argued. But, for the reasons which I have indicated, we think that that expression of opinion was right, and not wrong. I may just add as a make-weight, although it is not nearly so much the ground of my decision as the considerations which I have already formulated, that there is no machinery provided for doing the thing which would be necessary to be done in this case in order to make the rate a harmonious and consistent one. It is obvious that there is great convenience in insisting upon the finality of figures which are once deliberately entered in the rate-book, and which certainly are part of the evidence upon which an appellant very often acts in deciding whether he will appeal or not.

A case was put in which, as it appears to me, there might be a real wrong growing out of the contrary decision to that which we are now pronouncing, because it might be, and very likely would be, that an appellant who was satisfied with the gross estimated rental, but was dissatisfied with the amount of the deductions, might come into court with a very good case upon the ground of the amount of the deductions, and if he were then to be met with a wholly fresh case, of which he had no notice, as to gross estimated rental not being sufficient, it would involve, either an adjournment of the case upon terms, or his having to embark upon a long inquiry of an expensive nature, for which he might not be prepared, and, more than that, which most likely in many cases he never would have decided to accept, if he had known that the gross estimated value was to be made the subject of an attack, or amendment in the shape of increase.

The view which we are expressing is certainly on the whole rather more consonant with the language of 6 & 7 Will. 4, c. 96, s. 1, which is the starting-point in all these matters, than the contrary view would be. That section starts with the gross

estimated value as the thing from which deductions are to be made in order to arrive at the net.

It is quite true that in many instances practically the only way of getting at the gross estimated value is to start from the net, and make a calculation, and get at the gross value by adding something to the net. In many instances that must be the mental process that anybody must go through, because he has some data for fixing the net with certainty, where he has them not for fixing the gross. On the other hand there are many other cases in which the data which are capable of being ascertained with certainty do begin at the right end, and fix the gross as the first thing to be arrived at. But that is a mere detail as to how the figure is to be arrived at. However it is got at, the Act of Parliament seems upon the whole to indicate, as was said in *Denaby and Cadeby Colliery Co.* v. *Doncaster Assessment Committee* (1), that the gross value is the starting-point, and that the deductions are to be made from that.

I think for all these reasons the conclusion we ought to arrive at is that the Court of Quarter Sessions were right in refusing to embark upon this inquiry, and that the appeal from their decision must be dismissed.

KENNEDY J. I am of the same opinion, and entirely for the same reasons.

Appeal dismissed.

Solicitors for respondents: *Smiles & Co., for L. W. Lewis & Sons, Walsall.*

Solicitors for appellants: *E. Flux & Leadbitter, for Slater & Co., Darlaston.*

(1) 14 Times Rep. 347; 62 J. P. 343.

P. B. H.

1898
May 20.

MAYOR, &c., OF BURY ST. EDMUNDS *v.* COUNTY COUNCIL OF WEST SUFFOLK.

Local Government—Bridges (not being County Bridges) taken over by County Council—Liability of larger Quarter Sessions Boroughs to Contribute to Cost of—Local Government Act 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 6, 35, *sub-s.* 2.

The exercise by a county council of the powers conferred on them by s. 6 of the Local Government Act, 1888, of purchasing or taking over existing bridges not then being county bridges, or erecting new bridges, or maintaining, repairing, or improving any bridges so purchased, taken over, or erected, is a "purpose for which the quarter sessions of the county" were "authorized to incur cost" within the meaning of s. 35, sub-s. 2; and consequently a quarter sessions borough, not being a county borough, but containing a population of 10,000 or upwards, which, by reason of its liability to repair the bridges within the borough, was at the passing of the Act exempt from contributing to the costs of the then existing county bridges, cannot be assessed to county contributions in respect of costs incurred by the county council in the exercise of any of the above-mentioned powers.

SPECIAL CASE stated by consent of the parties.

The borough of Bury St. Edmunds is a municipal borough which was incorporated by charter in 1606. It is situate within the administrative county of West Suffolk. It is a quarter sessions borough with a separate commission of the peace. It contains a population of upwards of 10,000, but is not a county borough. At the passing of the Local Government Act, 1888, and at the present time there were and are certain bridges in the said borough which the plaintiffs were and are legally bound to maintain and repair. Since the passing of the said Act certain bridges in West Suffolk have become county bridges, all of which bridges (with the exception of two) were purchased, taken over, or erected by the defendants under the powers conferred upon them by s. 6 (1) of the said Act.

(1) By s. 6 of the Local Government Act, 1888, "The county council shall have power to purchase, or take over on terms to be agreed on, existing bridges not being at present county bridges, and to erect new bridges, and

The defendants since February, 1892, paid in respect of the said bridges sums amounting to 1570*l.* 4*s.* 4*d.* These sums were charged by the defendants in their county accounts as "general expenses," and the plaintiffs were assessed to those expenses according to their county rate basis in force at the time the payments were made, and thereby contributed the sum of 137*l.* 13*s.* as their rateable proportion of the said 1570*l.* 4*s.* 4*d.* The plaintiffs contended that by virtue of the Local Government Act, 1888, the payments made in respect of these bridges should have been charged not as general expenses, but as "special expenses" in accordance with the definition of that term in s. 68 of the Act, and that they should not have been assessed by the defendants to county contributions in respect thereof, and they claimed a declaration that they were not liable to contribute rateably to the cost of the purchase or taking over by the defendants of bridges under the powers conferred by s. 6 of the Local Government Act, 1888, nor to the erection by the defendants of new bridges, nor to the maintenance, repair, or improvement of any bridges so purchased, taken over, or erected.

W. Graham, for the plaintiffs. The liability of the borough

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to maintain repair and improve any bridges so purchased taken over or erected."

By s. 35, "In the case of a quarter sessions borough not being one of the boroughs named in the third schedule to this Act, but containing according to the census of 1881 a population of 10,000 or upwards the following provisions shall . . . . apply":—

"(1.) Nothing in this Act shall . . . . (save as in this Act expressly mentioned) alter the powers duties and liabilities of the council of the borough under the Municipal Corporations Act, 1882, but subject to the above provisions and to the savings hereinafter contained the borough shall form part of the county for the purposes of this Act, and the parishes in the borough shall, subject to the exemptions hereinafter mentioned, be liable to be assessed to county contributions in like manner as the rest of the county."

"(2.) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur cost the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose."

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council to repair the bridges in the borough under s. 119 of the Municipal Corporations Act, 1882, is preserved by s. 35, sub-s. 1, of the Act of 1888. So that primâ facie the borough is not liable to contribute to the repair of any bridges outside the borough. It is conceded by the defendants that the borough is not liable to contribute to county bridges existing at the passing of the Act, but there is nothing in the Act to distinguish between bridges which were county bridges at the passing of the Act and those which have become county bridges since the Act.

W. Wills, for the defendants. The plaintiffs are rightly called on to contribute to the cost of the bridges which have become county bridges since the passing of the Act. Under the Act quarter sessions boroughs are divided into three classes: 1. County boroughs, which have to maintain all bridges within their area. 2. Boroughs under 10,000 population, all the bridges in which are county bridges, the boroughs being part of the county. 3. Boroughs over 10,000. As to these, it may have been thought fair to preserve existing exemptions; but as to new county bridges, it was the intention to throw these boroughs into the county for the purposes of their expenses. From contribution to such expenses sub-s. 2 of s. 35 does not exempt them. Their repair is not a "purpose for which the quarter sessions of the county" were "authorized to incur cost." Still less could the quarter sessions incur the costs of taking the bridges over, which costs were preliminary to the bridges becoming county bridges at all. And as to the erection of new bridges, although the quarter sessions had power under s. 22 of the Highways and Locomotives Act, 1878, to contribute one-half of the expense, they had no power to erect a bridge entirely at their own cost. None of the matters then, to the cost of which the plaintiffs have been assessed, come within the exemption in sub-s. 2.

Graham, in reply.

RIDLEY J. I think this matter is fairly clear. The question arises under s. 35, which deals with the position of those larger quarter sessions boroughs which are not county boroughs. The section provides in sub-s. 1 that the powers, duties, and liabilities

of the council of the boroughs under the Municipal Corporations Act, 1882, shall continue, but "subject to the above provisions and to the savings hereinafter contained, the borough shall form part of the county for the purposes of this Act." Then sub-s. 2 says: "Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorized to incur cost the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose." Now this borough has always been liable to repair its own bridges, and therefore was at the passing of the Act exempt from contributing to the repair of county bridges, and as the repair of then existing county bridges was admittedly a purpose for which the quarter sessions of the county were authorized to incur cost, it is not disputed that the borough cannot be called on to contribute to the cost of that class of bridges. But it was contended that the exemption of the borough was not preserved in the case of bridges taken over or newly erected since the passing of the Act, for the reason that the cost of those bridges was not a purpose in respect of which the quarter sessions were authorized to incur costs. That depends on the meaning of the word "purpose." I think that that word must include not only the maintenance of existing bridges, but also all the powers as to bridges given to the county council by s. 6.

CHANNELL J. The whole question seems to turn on the interpretation which we ought to put on the word "purpose" in sub-s. 2 of s. 35. Now I think it is a very general word, and ought to be so interpreted. The sub-section says that where a borough is at the passing of the Act exempt from contributing towards costs incurred "for any purpose for which the quarter sessions . . . . are authorized to incur cost," the borough is not to be assessed to county contributions in respect of costs incurred for any such purpose. The quarter sessions were authorized to incur costs in reference to the maintenance of bridges, and they were also authorized to incur costs in reference

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to the erection of bridges—not indeed to bear the whole cost of such erection, but to contribute towards it. The expense of general county bridges was a substantial head of county expenditure, and was one in respect of which there was no power to call upon quarter sessions boroughs in the position of Bury St. Edmunds to contribute. That being the condition of things at the passing of the Act, the policy of the Act was to leave this class of boroughs in substantially the same pecuniary position as they were in before. Where, then, you find such a borough paying for its own bridges primâ facie it ought not to pay any share of the cost of bridges in the county outside the borough. That being the general principle, the only difficulty arises in connection with s. 6, which confers a new power upon the county council. It is quite clear that, if a new power is conferred upon the county council of incurring costs for some new purpose for which the quarter sessions had formerly no power of incurring costs, the boroughs are liable to contribute to the expenses resulting from the exercise of that power. So that the question turns upon whether the power given by s. 6 is a power to incur costs for a new purpose. I am of opinion that it is not. It is, I think, merely an enlarged power of incurring costs for the same purpose for which the quarter sessions had previously a more limited power. On these grounds I think we ought to make the declaration asked for.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Edgar Robins & Clark, for Salmon, Bury St. Edmunds.*

Solicitors for defendants: *White, Borrett & Co., for A. Townshend Cobbold, Ipswich.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1898
June 17, 23.

MACKINNON *v.* CLARK.

Parliament—Election—Return of Election Expenses—"Transmit"—Error in Return—Penalties—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 *Vict. c.* 51), *ss.* 33, 34.

In sub-s. 1 of s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883 (which provides that, within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall "transmit" to the returning officer a true return respecting his election expenses), the word "transmit" means "send," and therefore, if the return is posted to the returning officer within the thirty-five days, the sub-section is complied with, although the return does not reach him until after the expiration of that period.

The fact that the return of election expenses transmitted to the returning officer under s. 33 contains an error does not make it a nullity so as to render the candidate liable to the penalties imposed by sub-s. 5 of that section upon a candidate for sitting or voting before the return required by the Act has been transmitted.

APPEAL by the defendant against the judgment of Kennedy J. at the trial before him without a jury, and cross-appeal by the plaintiff.

The action was to recover penalties from the defendant for having sat and voted in the House of Commons as a member of Parliament in contravention of s. 33, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883.

On July 22, 1895, a parliamentary election was held for the county of Caithness at which the defendant was the successful candidate. The poll was declared on July 23. The defendant, who acted as his own election agent, posted the return of his election expenses, addressed to the returning officer at Wick, in the letter-box of the House of Commons about 10.45 P.M. on August 27, 1895. It arrived in Wick in due course of post on August 29. The defendant sat and voted in the House of Commons on August 28, and also on forty-eight other days subsequently to the receipt of the return by the returning officer. There were certain errors and omissions in the return

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made by the defendant of his election expenses in respect of all of which but one he applied to the Court of Session in Scotland for, and obtained an order for, an "authorized excuse" under s. 34 of the Corrupt and Illegal Practices Prevention Act, 1883, but one payment of 2*l.* 9*s.*, which had been omitted from the return, was overlooked, and in consequence no application for an authorized excuse had been made in respect of that omission. The plaintiff claimed penalties of 100*l.* for each of the forty-nine days upon which the defendant sat and voted as before-mentioned, making in all 4900*l.*

The learned judge gave judgment for the plaintiff for one penalty in respect of the defendant's having sat and voted on August 28, but gave judgment for the defendant in respect of the other penalties claimed. (1)

The defendant in person. The return in this case was "transmitted" within the thirty-five days in accordance with s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883. The word "transmit" in that section means "send off." By sub-s. 6 of that section a candidate or election agent who, without such authorized excuse as in the Act mentioned, fails

(1) The Corrupt and Illegal Practices Prevention Act, 1883, s. 33, sub-s. 1: "Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return (in this Act referred to as a return respecting election expenses) in the form set forth in the second schedule to this Act or to the like effect, containing, as respects that candidate" [here follows an enumeration of the matters to be included in the return].

Sub-ss. 2, 3, 4 provide that the return shall be accompanied by certain declarations in the Act referred to as declarations respecting election expenses.

Sub-s. 5: "If in the case of an election for any county or borough, the said return and declarations are not transmitted before the expiration of the time limited for the purpose, the candidate shall not, after the expiration of such time, sit or vote in the House of Commons as member for that county or borough until either such return and declarations have been transmitted, or until the date of the allowance of such an authorized excuse for the failure to transmit the same, as in this Act mentioned, and, if he sits or votes in contravention of this enactment, he shall forfeit one hundred pounds for every day on which he so sits or votes to any person who sues for the same."

Sub-s. 6: "If without such authorized excuse as in this Act mentioned a candidate or an election agent fails to comply with the requirements of this section he shall be guilty of an illegal practice."

to comply with the requirements of the section is guilty of an illegal practice. If, as the plaintiff contends, the word "transmit" as used in the section means "lodge with" or "deliver to" the returning officer, then, in the event of a failure by the post to deliver a return which has been duly posted, the candidate and the election agent would be made guilty of an illegal practice without any default on their part, which cannot have been the intention. The cases of *Pennell* v. *Uxbridge* (*Churchwardens*) (1) and *Banks* v. *Goodwin* (2), which will be relied upon in support of the judgment, were decided with reference to the practice under a statute enabling justices to state a case, a matter which is not analogous to the present.

A. T. Lawrence, Q.C., and *Courthope Munroe*, for the plaintiff. The judgment of the learned judge was correct as to the penalty for voting on August 28. It is submitted that the word "transmit" in s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883, means "lodge" with the returning officer. Transmission means effecting a transit from one place to another. Not only is that the natural meaning of the word, but so to construe it in this Act is in accordance with the reason of the thing: *Aspinall* v. *Sutton* (3); *Hurdle* v. *Waring*. (4) If a return posted in due time were not delivered in due time by default of the post, then the failure to transmit the return and declarations as required would, as a matter of course, be excused by the Court under s. 34 of the Act, as arising by reason of inadvertence or some reasonable cause of a like nature within the meaning of sub-s. 1 (*a*) of that section.

Secondly, the plaintiff is entitled to judgment for penalties for forty-eight days, besides the penalty for which he had judgment. Sect. 33, sub-s. 1, provides that the election agent of the candidate shall transmit to the returning officer a "true return" respecting his election expenses, and sub-s. 5 speaks of the "said return," meaning thereby the true return mentioned in sub-s. 1. A false return is no return at all for the purposes of the section.

Cur. adv. vult.

(1) (1862) 31 L. J. (M.C.) 92.
(2) (1863) 32 L. J. (M.C.) 87.
(3) [1894] 2 Q. B. 349.
(4) (1874) L. R. 9 C. P. 435.

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June 23. A. L. SMITH L.J. read the following judgment:—This is an action by the plaintiff, as a common informer, to recover from the sitting member for the county of Caithness penalties amounting to the sum of 4900*l.* for having sat and voted in the House of Commons as member for that county forty-nine times without, as it is alleged, having made a return of his election expenses, pursuant to s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51). My brother Kennedy has held that the defendant is liable for one penalty of 100*l.*—that is, for voting upon August 28, 1895, and the defendant appeals against this judgment of the learned judge. The plaintiff appeals against the learned judge for having held that the plaintiff was not entitled to forty-eight other penalties of 100*l.* each, amounting to the sum of 4800*l.*, for having voted after the return reached the returning officer upon August 29, 1895.

The facts are extremely short. Upon July 23, 1895, the defendant, Dr. Clark, was declared elected to represent the county of Caithness in the House of Commons. At midnight of August 27, 1895, the thirty-five days within which Dr. Clark, who was his own election agent, had to "make" (I use here advisedly a neutral word) his return of election expenses to the returning officer expired. Before midnight of that day, namely, at 10.45 P.M. upon August 27, 1895, Dr. Clark in London posted his return to the returning officer, who was resident at Wick, in Caithness. Upon the next day (August 28, 1895) Dr. Clark sat and voted in the House of Commons, and also upon forty-eight occasions subsequent to the receipt of the return by the returning officer, which reached him upon August 29, 1895. The question is, under these circumstances, has Dr. Clark become liable to any, and what, penalties under the Act of 1883?

This depends, first of all, upon what in s. 33 of the Act is the meaning of the words "transmit to the returning officer." Sub-s. 1 of that section runs thus: "Within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall transmit to the returning officer a true return

(in this Act referred to as a return respecting election expenses)"; and by sub-s. 5 the candidate is liable to a penalty of 100*l.* for each day he votes without having done so.

It is said on behalf of the plaintiff that the words "transmit to the returning officer" mean not only that the return shall be sent off to the returning officer within the thirty-five days, but that it shall actually be delivered to or lodged with him within that period. It will be observed that the section says nothing about delivery to or lodgment of the return with the returning officer within the thirty-five days. This is remarkable, for if lodgment with the returning officer is what the Legislature was aiming at, why has it not said so in distinct terms? All the section enacts is, that the agent shall within the prescribed period transmit the return to the returning officer. This is what the agent has to do from where he happens to be, and I can find no obligation cast by this section upon the agent to go, as in the present case, from London to the other end of the United Kingdom to ascertain whether the returning officer has received the return; nor in the Act is there to be found any obligation upon the returning officer to forward to the agent an acknowledgment of the receipt of the return. The word "transmit" in this section in my judgment means the same thing as the word "send" or "remit," and, for reasons I will presently give, it does not mean "lodge," as the plaintiff contends. The plaintiff's construction of the word "transmit" brings about the extraordinary result that, if the return is sent off, say, a week before the expiration of the thirty-five days, and in ample time to reach its destination within the thirty-five days, yet the candidate is guilty of an illegal practice (see s. 33, sub-s. 6) if the return happens to perish upon its way, and does not reach the returning officer within the prescribed time, and the member votes, unless he can obtain an "authorized excuse." It is said by the plaintiff that s. 33, sub-s. 6, makes the non-lodgment of the return within the thirty-five days an illegal practice only if the candidate does not get an "authorized excuse" as provided by that section, and, if the return perished upon the way through no fault of the candidate, he could always obtain such an excuse.

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Is this correct? We must look to s. 34 of the Act to see in what cases the Court can make an order allowing an "authorized excuse." Now it appears to me strange that the statute should make the failure to transmit the return within the thirty-five days within the meaning of the section an illegal practice dependent upon whether an "authorized excuse" for not doing so can be obtained or not. But in respect of what can an "authorized excuse" be obtained? Sect. 34 is explicit upon the point. It enacts by sub-s. 1 (*a*) that "if the candidate applies to the High Court or an election court and shews that the failure to transmit such return and declarations, or any of them, or any part thereof, or any error or false statement therein, has arisen by reason of his illness or of the absence, death, illness, or misconduct of his election agent or sub-agent, or of any clerk or officer of such agent, or by reason of inadvertence, or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant," the Court may grant an "authorized excuse." Take the case of the return being destroyed whilst in transit to the returning officer, say, in the Abergele Railway accident or in the Tay Bridge accident; under what head of "authorized excuse" in this section does this come? It seems to me under none, and, if this be so it is cogent, if not conclusive, to shew that the plaintiff's reading of the word "transmit" is erroneous, for, if it means lodgment of the return with the returning officer within the thirty-five days, and not the sending off of the return within that time, there would surely have been an "authorized excuse" obtainable under s. 34 for what might happen to the return during its transit to the returning officer, so that, if it arrived with that officer outside the thirty-five days by reason of circumstances beyond the control of the candidate, he might be able to obtain the "authorized excuse" provided for by the section; for it must be admitted that under s. 33, sub-s. 6, without obtaining an "authorized excuse," the candidate in such circumstances would be guilty of an illegal practice and liable to the consequences thereof. It is said that the words in s. 34, sub-s. 1 (*a*), "by reason of inadvertence," cover the case of the return perishing during transit, but this,

in my judgment, is not the meaning of these words, for they mean the overlooking or forgetting of something, and not accidents which may happen to the return itself after it is sent off, and whilst on its way to the returning officer. It also appears to me that such a loss of the return is not covered by the words "any reasonable cause of a like nature" in the section, for the perishing of the return is not of a like nature to the other matters mentioned in the section. In my judgment, the "authorized excuses" in s. 34 do not cover the case of a return perishing during transit. By s. 23 of the Act power is given to the Court, irrespective of granting an "authorized excuse," to except innocent acts from being illegal practices, and under this the candidate might obtain relief; but this in no way affects the question, for what "authorized excuses" are to be given under s. 34, sub-s. 1 (*a*), so as to cause the non-sending of the return within the prescribed period not to be an illegal practice within s. 33, sub-s. 6. I do not myself think that the cases cited—namely, *Pennell* v. *Uxbridge* (*Churchwardens*) (1) and *Banks* v. *Goodwin* (2) and others—throw any real light upon what is the meaning of the word "transmit" in s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883, and, if I were to refer to cases I would cite the case of *Comber* v. *Leyland*, recently decided by the House of Lords (but not yet reported (3)), upon the word "remit" in the contract in that case. The word "transmit" may well have a different meaning in different statutes and in different contracts. For the reasons above I cannot agree with my brother Kennedy in thinking that the word "transmit" in this section means "lodge," and, in my opinion, Dr. Clark did not violate s. 33, sub-s. 5, when he voted upon August 28, 1895, having sent off his return to the returning officer at 10.45 P.M. upon the day before, namely, August 27, 1895.

Another point was taken by the learned counsel for the plaintiff, which has only to be stated to shew that it is utterly untenable. It is this—that a return with an error in it is no return at all; that, although an agent of a candidate has sent off to the returning officer the return of the candidate's

(1) 31 L. J. (M.C.) 92.
(2) 32 L. J. (M.C.) 87.
(3) It will be found in the next forthcoming part of [1898] A. C.

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election expenses within the thirty-five days, and such return has reached the returning officer within that period, yet, if it be subsequently discovered that an expense, say, of 2*s.*, which should have been returned, has by error been omitted, nevertheless, if the sitting member in utter ignorance of this omission has voted, say, ten, twenty, or even a hundred times in the House of Commons, he is liable to a penalty of 100*l.* upon each day upon which he votes. This notion is to me preposterous. I entirely agree with what my brother Kennedy has held as to this. It is said that s. 33, sub-s. 1, enacts that the return to be made within the thirty-five days is to be a true return, and that a return with a blunder in it is therefore no return at all within the Act. But s. 34, sub-s. 1, shews clearly that this is not so, for by it the Court may grant an authorized excuse for the failure to "transmit such return," and also for "any error or false statement therein," which shews to demonstration that a return with errors in it is still a return within the Act. For the errors which did exist in the return sent in by Dr. Clark he has obtained "authorized excuses" in the Court in Scotland, excepting as to a sum of 2*l.* 9*s.* which was overlooked when "authorized excuses" were applied for and obtained. We have nothing to do with any proceedings which may be taken as regards this 2*l.* 9*s.* item, for it in no way affects the claim of the plaintiff for penalties against Dr. Clark for having voted either before or after the return with the omission in it reached the returning officer.

For the reasons above I think that Dr. Clark has not brought himself within the meshes of the Act so far as to be liable to penalties for having voted without having made a return within the Act, and that the appeal of Dr. Clark, the defendant, succeeds, and should be allowed with costs here and below, and that the appeal of the plaintiff fails and should be dismissed with costs.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

Appeal allowed and cross appeal dismissed.

Solicitors: *Leggatt, Rubinstein & Co.*

E. L.

HORSEY ESTATE, LIMITED *v.* STEIGER AND THE PETRIFITE COMPANY, LIMITED.

1898
March 25;
May 11.

Landlord and Tenant—Lease—Proviso for Re-entry—Company—Liquidation for Purposes of Reconstruction.

A lease contained a proviso for re-entry if the lessees, being a company, "shall enter into liquidation voluntary or compulsory." The lessees, a solvent limited company, entered into liquidation for the purpose only of reconstruction with additional capital:—

Held, that this was a liquidation within the meaning of the proviso.

ACTION, tried before Hawkins J., to recover possession of premises under a proviso for re-entry contained in a lease.

The following statement of the facts proved at the trial, which are material for the purposes of this report, is taken from the judgment of the learned judge.

On November 4, 1889, by a deed bearing that date, Messrs. Bond, Attlee, and Boot, the trustees of the will of Thomas Horsey, deceased, demised to John Donelly and a company duly registered under the Companies Acts, 1862 to 1887, a piece of ground at Blackwall for a term of twenty-one years from September 29, 1889, at rents therein mentioned, payable quarterly. By the said lease the lessees for themselves and their assigns, and as a separate covenant each of them for himself and itself respectively and his and its respective assigns, covenanted to pay the said rents; to repair all buildings which thereafter might during the said term be erected on the demised ground, and, further, "that the lessees will not at any time or times during the said term assign or underlet the said premises, or any part thereof, to any person or persons without first obtaining the consent of the lessors in writing for that purpose; but it is hereby agreed that such consent shall not be unreasonably or vexatiously withheld in the case of the lessees satisfying the lessors that the proposed assignee or underlessee is a substantial, respectable, and responsible person." Later on in the lease there follows a proviso that if the rents, or any part thereof, shall be in arrear for twenty-one days, or the lessees shall at

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any time fail or neglect to observe or perform any of their covenants, or "if the lessees shall become bankrupt, or enter into liquidation for the benefit of or compound with their creditors, or being a company shall enter into liquidation whether compulsory or voluntary," then the lessors may re-enter and avoid the lease.

On August 1, 1894, the lessors named in the lease conveyed all their interest in the premises to the now plaintiffs, a limited company, who thenceforth became and now are the lessors of the premises. On December 13, 1895, the then lessees, being the original lessees in the lease, assigned, with the assent of the lessors, the residue of their term to the defendants Jacob Steiger and the Petrifite Company, Limited, who then and from thenceforth became and now are the lessees of the premises within the meaning of the said lease. The assent of the lessors above referred to was, however, expressly limited to that particular assignment. The objects of the Petrifite Company, Limited, and Mr. Steiger, to whom the lease was so assigned, are not material to the present action. In December, 1896, the Petrifite Company at a general meeting duly passed, under s. 129 of the Companies Act, 1862 (25 & 26 Vict. c. 89), a resolution for a voluntary winding-up. Such resolution was duly confirmed at a meeting held on January 26, 1897, on which day a liquidator was duly appointed to carry out the resolution. But it must be stated as a fact that this liquidation was not because of any pecuniary embarrassment of the Petrifite Company, but simply for the purpose of reconstructing the company and increasing its capital, and that in furtherance of this object a new company was on September 27, 1897, duly formed and registered by the same name, and such company, which hereafter I shall call "the new company," is still in existence. On October 29, 1897, under the provisions of s. 14 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), a notice was served upon both the original and the present lessees preparatory to taking proceedings to enforce the right of re-entry claimed in this action. One of the matters relied on in the notice is the entry of the company into liquidation within the meaning of the proviso; and, with the exception

of two alleged breaches of covenant which were expressly abandoned at the trial, that was the only ground upon which the plaintiffs claimed to re-enter when this action was commenced by the issuing of the writ on November 4, 1897.

On December 2, 1897, an agreement was entered into between the lessees and the new company which was alleged by the plaintiffs (the lessors) to amount to a breach of the covenant not to assign or underlet the premises without the consent of the lessors, which consent had neither been given nor even asked for. By that agreement, to which the original Petrifite Company and the new company were parties, for considerations therein mentioned, it was agreed that the Petrifite Company, with the approval of Steiger, should sell and the new company should purchase (inter alia) "all the right and interest in the Petrifite Company in the said leasehold premises for the residue of the said lease," and that the Petrifite Company would assign, and procure the concurrence of all other necessary parties in assigning, to the new company (inter alia) all the interest of the Petrifite Company therein. There is in the agreement this further stipulation—that though the purchase might not then be completed, the new company should be let into possession of the premises within seven days of the first allotment of the shares in the new company, and as from that date should be deemed to have taken over the same, and should as from that date pay all rents, &c. (that is, to the lessors), but that in the event of a rescission of that agreement (which has not happened) possession of the premises should be redelivered to the Petrifite Company and Steiger. Under this agreement for sale the new company was let into, and still remains in, possession; but nothing more has been done towards the completion of the sale of the lease, and no assignment has been made, nor has any application been made to the lessors, for their assent to such an assignment.

To enable the lessors to rely upon this new ground of forfeiture an amendment of the statement of claim was allowed by a master of the court on the application of the plaintiffs. This, however, being insufficient to render it admissible, for it was not alleged to have been committed before action brought, for

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the sake of avoiding the expense of a new action the parties, on a trial before me without a jury, agreed, on terms immaterial for my judgment, that the alleged new ground of forfeiture should be treated and dealt with as if it had existence before the writ. I have, therefore, so treated it. No question was raised as to the plaintiffs' position as lessors and reversioners, nor as to the defendants' position as lessees within the meaning of the original lease.

Christopher James, and *B. A. Cohen*, for the plaintiffs. The Petrifite Company "entered into liquidation" within the meaning of the proviso for re-entry in the lease. The fact that the liquidation was only for purposes of reconstruction is immaterial. By entering into a voluntary liquidation the company put an end to its existence, and the plaintiffs lost the benefit of its responsibility under the covenants in the lease. Both the defendants have incurred a forfeiture; but the right to re-enter would equally apply if only one of them had. There was also a breach of the covenant not to assign or underlet without the consent of the lessors.

Boome, and *Timins*, for the defendant Steiger. The proviso must be strictly construed. The word "lessees," in the plural, is used, and there is no right to re-enter unless both the lessees become bankrupt, &c. Steiger has not become bankrupt, nor entered into liquidation for the benefit of, nor compounded with, his creditors, nor broken any covenant in the lease. The proviso, therefore, does not apply.

Clarke-Williams, for the Petrifite Company. The liquidation meant in the proviso is a liquidation, either compulsory or voluntary, for the benefit of creditors. The proviso is aimed at insolvency by the company. A liquidation by a solvent company entering into the liquidation merely for the purpose of reconstruction with additional capital is not within its terms. The company does not become extinguished for all purposes. There has been no breach of the covenant not to assign or underlet without the lessors' consent. The contract for sale of December 2, 1897, is only conditional; there has been no complete alienation of the legal interest in the lease. The notice given

under s. 14 of the Conveyancing and Law of Real Property Act, 1881, was invalid, because it was only given a few days before action, and a reasonable time was not given to the lessees to remedy what is complained of. [He referred to *In re Oriental Bank Corporation, Ex parte Guillemin.* (1)]

B. A. Cohen replied.

Cur. adv. vult.

May 11. The following written judgment was delivered :—

HAWKINS J. (after stating the facts set forth ante). I proceed now to deal in their order of date with the two grounds of forfeiture discussed before me, the first raising this question—whether a right of re-entry was created by the entering of the Petrifite Company into voluntary liquidation as above stated; the company's co-lessee, Steiger, having neither become bankrupt, nor entered into liquidation for the benefit of nor compounded with his creditors. The answer to this question depends upon the true construction of the language of the proviso. I agree with the contention of the learned counsel for the defendants that provisoes for re-entry ought to be construed strictly, which, after all, according to my idea, means but little—no more, indeed, than this: that the right of re-entry must be determined by the intention of the parties to the lease so far as it is expressed in, or can be collected from, the language used by them in the lease; and it certainly does not mean that in every stipulation involving a forfeiture those whose duty it is to construe it ought to endeavour to discover, not the true meaning of it, but to adopt any possible interpretation, however forced and unreasonable, with the mere object to defeat the forfeiture, when by a fair and reasonable interpretation the forfeiture would clearly be established. In *Bristol Corporation* v. *Westcott* (2), Sir George Jessel M.R. points out (3) various considerations which must be applied for the purpose of construing covenants which it is impossible to deal with literally, but where nevertheless the intention of the parties can be collected from the language of the covenants.

(1) (1884) 28 Ch. D. 634. (2) (1879) 12 Ch. D. 461.
(3) 12 Ch. D. at p. 466.

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Hawkins J.

In the same case Cotton L.J. (1) said, "Although it is a question of forfeiture we must construe the covenant fairly, ascertain its meaning without regard to forfeiture, and then see whether upon that ascertained meaning, a forfeiture has been incurred." In these words he entirely expresses my views. The same view had already been practically expressed in the case of *Varley* v. *Coppard*. (2) The question there was whether, under a covenant not to assign, an assignment of his interest by one of two joint lessees to the other was a breach of the covenant. Willes and Keating JJ. held that it was. Willes J. (3) said: "The covenant, though it relates to the estate of the two, necessarily involves the interest of each; it means that neither of them shall assign the whole or any part of his interest without consent; otherwise a tenant might assign all but a sixty-fourth part." It has been suggested that the authority of this case was doubted by a dictum of Jessel M.R. in *Bristol Corporation* v. *Westcott* (4); but I do not read any words of the Master of the Rolls as expressing any disagreement with the law as stated by Willes J. Construing this proviso fairly, I cannot say that it ought to be read as making it necessary that each of the lessees must become bankrupt or in liquidation before any right of re-entry could accrue. It is true the words of the proviso are "if the lessees shall become bankrupt"; but it is clear that the word "lessees," in the plural, cannot literally be so construed. Such a construction would render the forfeiture impossible; for a registered company cannot become bankrupt: see Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 123; nor could the words "or enter into liquidation, &c., for the benefit of his creditors" apply or be intended to apply to the incorporated company, or to any but the individual lessee. This part of the proviso fairly construed can only mean "if the individual lessee shall become bankrupt or compound with *his* creditors," and can have no relation whatever to the company. The proviso then continues, "or being a company shall enter into liquidation," the lessors may re-enter. (This clearly could not refer to the individual lessee.) The reasonable meaning to

(1) 12 Ch. D. at p. 467.
(2) (1872) L. R. 7 C. P. 505.
(3) L. R. 7 C. P. at p. 507.
(4) 12 Ch. D. 461.

be attached to this proviso, reading it sensibly and fairly, in my opinion, amounts to this—if the individual lessee becomes bankrupt, &c., *or* the company enters into liquidation, the right of re-entry shall accrue. True this is somewhat clumsily expressed in the lease; but, to my mind, the words employed express to demonstration the intention of both parties that the forfeiture should be incurred if either the individual or the company brought him or itself respectively within the scope of the language employed. If this was the true intention and contract of the parties when the lease was executed, I see no reason why it should not be enforced.

One word more as to the reason and probability for such a construction. When the lease was granted the lessors had the responsibility and solvency of the two lessees named in the lease, or of others who by the assent of the lessors might succeed them as lessees, and it cannot be doubted that both parties contemplated the continuance of this state of things during the continuance of the term, and the provisions in the lease were framed with this object; but such intentions would be defeated if the company ceased to exist by reason of its liquidation, whether for one reason or another, as it practically would do at the commencement of the winding-up. See s. 131 of the Companies Act, 1862 (25 & 26 Vict. c. 89), and per Jessel M.R. in *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.* (1), or if by bankruptcy the responsibility and inability of the individual lessee to discharge the obligations of his lease were destroyed.

I have carefully considered the question whether the term "liquidation" in the proviso as applied to the company ought to be limited to a liquidation in the nature of bankruptcy, or for the benefit of creditors; but I am unable to discover any grounds for such limitation. The liquidation of a company, whether for one purpose or another, must result in the extinguishment of such company. The effect of such extinguishment I have already pointed out. As applied to the individual lessee, the meaning of the term "liquidation" is limited to a liquidation by reason of pecuniary embarrassment.

(1) (1882) 20 Ch. D. 260, at p. 267.

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Hawkins J.

In my opinion, then, the right of re-entry followed upon the entering into liquidation of the original Petrifite limited company, and upon this ground I think the plaintiffs are entitled to my judgment.

Having arrived at this conclusion, it is not necessary to deal minutely with the ground of forfeiture alleged secondly—namely, the breach of the covenant not to assign or underlet. As, however, the matter is before me, I will express shortly my opinion.

Under the circumstances I have stated with respect to the agreement for sale of December 2, 1897, I fail to see how this ground of forfeiture can be supported. There clearly has been no assignment to the new company. In *Doe* v. *Hogg* (1) Abbott C.J. (2) said that the effect of a covenant not to assign was only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord.

As to the contention that it was an underletting, I can see no ground for it. The new company never were in any sense tenants to the Petrifite Company; they did not enter as tenants at all, but have merely taken and held possession as purchasers whose purchase has never been completed. The language of Blackburn J. in *West* v. *Dobb* (3) seems to me to settle this point notwithstanding the cases of *Roe* v. *Sales* (4) and *Doe* v. *Jackson*. (5) As regards the permissive occupation, or parting with the possession of the premises, I can only say that the usual stipulation against it without permission seems to have been carefully excluded from the covenant in question.

There must be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Druce & Atlee.*
Solicitor for defendant Steiger: *J. H. Durant.*
Solicitor for defendant company: *H. E. Warner.*

(1) (1824) 4 D. & R. 226.
(2) 4 D. & R. at p. 228.
(3) (1869) L. R. 4 Q. B. 634, at p. 638.
(4) (1813) 1 M. & S. 297.
(5) (1823) 1 B. & C. 448.

W. A.

ALTREE *v.* ALTREE.
STAFFORDSHIRE FINANCIAL COMPANY, LIMITED, CLAIMANTS.

1898
June 8.

Bill of Sale—Validity—Address of Grantee—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Sched.*

A bill of sale given by way of security for the payment of money by the grantor is void, under s. 9 of the Bills of Sale Act, 1882, as not made in accordance with the form in the schedule, if the grantee's address be not given in the bill of sale.

APPEAL from the Lichfield County Court.

In an interpleader issue tried in the county court goods taken in execution were claimed under a bill of sale, of which the claimants were grantees.

The bill of sale was made and given by way of security for the payment of money by the grantor, and commenced as follows: "This indenture made the 12th day of March, 1898, between John Altree of Triangle Farm, Chasetown, in the parish of Hammerwich, in the county of Stafford, farmer (hereinafter called the borrower), of the one part, and the Staffordshire Financial Company, Limited (hereinafter called the lenders), of the other part." No other description, and no address, of the grantees was given in the bill of sale.

The county court judge held that it was void under s. 9 of the Bills of Sale Act, 1882, as not being made in accordance with the form in the schedule annexed to the Act. (1)

The claimants appealed.

J. B. Matthews, for the claimants. It is clear that the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), did not require the description or address of the grantee to be inserted in the bill

(1) The Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9: "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The "Form of Bill of Sale" in the schedule begins: "This indenture made the ——— day of ———, between A.B. of ——— of the one part, and C.D. of ——— of the other part, witnesseth," &c.

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of sale. Sect. 10, sub-s. 2, expressly requires "a description of the residence and occupation" of the grantor to be given, but there is no such provision with respect to the grantee. In the form of register given in Sched. B to that Act the first three columns respectively are to contain the name, residence, and occupation of the person by whom the bill of sale is given; but the fourth column, which is headed simply "To whom given," is the only one dealing with grantees. The Bills of Sale Act, 1882, does not make it imperative to give a description, or the address, of the grantee. The form need only be strictly followed where there is some specific direction making it imperative to state the description or address, as, for instance, there is with respect to an attesting witness. Sect. 11 provides for the local registration of bills of sale, and rules 3 and 8 of the Rules of the Supreme Court made under the Acts of 1878 and 1882 provide for the form of register to be kept by registrars of county courts, in which form there is still no column for entering the description or address by the grantee, though there is one for entering the residence and occupation of the grantor. It is a strange result if, though the grantee's description and address need not appear on the register, they must be stated in the bill of sale. It is submitted that that result is not effected by reason merely that "of ———" is put after the grantee's name in the form. Next, if the description and address of a private person, who is grantee, must be stated, there is no necessity to state them in the case of a limited company, because those particulars can be found in the register kept under the Companies Acts, and there cannot be two limited companies registered under the same name. Sect. 9 of the Bills of Sale Act, 1882, only provides that bills of sale shall be "in accordance with the form," not "in the form," in the schedule. A bill of sale is required to be in the form for the protection of the borrower; it need not be in the exact form. It is good unless it departs from the form substantially, or in some material respect: *Ex parte Stanford, In re Barber* (1); *Thomas* v. *Kelly* (2); *Linfoot* v. *Pockett.* (3) Omitting the grantee's

(1) (1886) 17 Q. B. D. 259; Lord Esher M.R., at p. 264.

(2) (1888) 13 App. Cas. 506; Lord Halsbury L.C., at p. 511; Lord Fitzgerald, at p. 516.

(3) [1895] 2 Ch. 835.

address is not such a departure from the form. The practice of conveyancers has always been to describe a corporation or limited company by giving its name only. The county court judge, in support of his decision, relied on *Parsons* v. *Brand*, *Coulson* v. *Dickson* (1), and *Sims* v. *Trollope & Sons* (2); but those cases are not in point. In both of them the question was whether the attesting witness was sufficiently described, there being an express direction in the form that his name, address, and description shall be inserted. [He also referred to *Maughan* v. *Sharpe* (3); *Shears* v. *Jacob* (4); *Murray* v. *Mackenzie* (5); *Dolcini* v. *Dolcini* (6); *Smith* v. *Hammond.* (7)]

Disturnal, for the execution creditor, was not heard.

DAY J. I am of opinion that the objection taken before the county court judge to this bill of sale was well founded. Sect. 9 of the Act of 1882 provides that a bill of sale made or given by way of security for the payment of money by the grantor "shall be void unless made in accordance with the form in the schedule to this Act annexed." When one comes to look at the form in the schedule the grantee is described as "C.D. of ———." The county court judge has held that the bill of sale is not in accordance with the form because the blank space after the grantees' name has not been filled up, and no address or description of the grantees has been given. I think that the judge was right, and this is a bad bill of sale. The appeal must, therefore, be dismissed.

LAWRANCE J. I am of the same opinion.

Appeal dismissed; leave to appeal was given on terms.

Solicitors for appellants: *Smiles & Co., for L. W. Lewis & Sons, Walsall.*

Solicitors for respondent: *Pitman & Sons, for Barnes & Son, Lichfield.*

(1) (1890) 25 Q. B. D. 110.
(2) [1897] 1 Q. B. 24.
(3) (1864) 34 L. J. (C.P.) 19.
(4) (1866) L. R. 1 C. P. 513.
(5) (1875) L. R. 10 C. P. 625.
(6) [1895] 1 Q. B. 898.
(7) [1896] 1 Q. B. 571.

W. A.

1898
June 10.

BAILEY *v.* WATSON & CO.

County Court—Costs—Remitted Action—Judgment in High Court for Part of Claim—Scale applicable in County Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action of contract brought in the High Court, upon an application for judgment under Order XIV., an order was made that the plaintiff be at liberty to sign final judgment for a sum of 27*l.*, part of the amount claimed, with costs to be taxed; that the defendants have leave to defend as to a sum of 2*l.* odd, which was the residue of the claim then remaining in dispute, and that the action be tried in the county court under s. 65 of the County Courts Act, 1888. The defendants paid the 27*l.* and taxed costs, and afterwards the plaintiff lodged the writ and order in the county court. At the trial in the county court the plaintiff recovered the 2*l.* odd, with costs:—

Held, that he was entitled to a taxation of his costs on the lower scale in use in county courts where the sum recovered exceeds 2*l.* but does not exceed 10*l.*, and not on the higher scale (Col. B), where the sum recovered exceeds 20*l.* but does not exceed 50*l.*

Keeble v. *Bennett*, [1894] 2 Q. B. 329, distinguished.

APPEAL from the Swansea County Court.

An action of contract was brought in the High Court of Justice, Swansea District Registry, to recover 44*l.* 9*s.* 11*d.*, and the plaintiff took out a summons for judgment under Order XIV. Upon the hearing of the summons the district registrar of the High Court made an order that the plaintiff be at liberty to sign final judgment for 27*l.* 18*s.* 5*d.*, with costs to be taxed; that the defendants have leave to defend as to 2*l.* 0*s.* 6*d.* (the remainder of the claim being abandoned), and that the action be remitted to the Swansea County Court.

The defendants paid the 27*l.* 18*s.* 5*d.* and the costs taxed according to the higher scale of costs in use in county courts (Col. B), where the sum recovered exceeds 20*l.* but does not exceed 50*l.* (1)

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, if in any action of contract brought in the High Court the claim on the writ does not exceed 100*l.*, and the whole or part of the demand of the plaintiff be contested, the action may, upon the application of either party, be ordered to be tried in the county court, "and thereupon the plaintiff shall lodge the

Afterwards the plaintiff lodged the writ in the action and the order made by the district registrar with the registrar of the county court, and at the trial he recovered judgment for the 2*l.* 0*s.* 6*d.* with costs. Upon taxation of the costs the registrar of the county court allowed the costs upon the lower scale in use in county courts—"Where the amount recovered exceeds 2*l.* and does not exceed 10*l.*" A further review of the taxation was had before the registrar, with the result that he adhered to his original decision, stating in a written judgment his view of the law on the subject, and distinguishing *Keeble* v. *Bennett* (1) from the case before him.

Upon an appeal by the plaintiff to the county court judge, the latter reversed the registrar's decision and allowed costs on the scale between 20*l.* and 50*l.*

The defendants now appealed.

R. O. B. Lane, jun., for the defendants. The decision of the registrar of the county court was right. The plaintiff, having recovered in the county court a sum exceeding 2*l.* but less than 10*l.*, was only entitled to costs on the lower scale. *Keeble* v. *Bennett* (1) is distinguishable. There the action as to the whole claim was sent for trial in the county court, whilst in the present case part of the cause of action only was remitted —namely, the claim for 2*l.* 0*s.* 6*d.*

V. Meager, for the plaintiff. This case is concluded by *Keeble* v. *Bennett*. (1) In order to ascertain the scale of costs applicable, the whole amount recovered in the action must be

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original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action . . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order . . . . shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

By s. 116, if in an action brought in the High Court the plaintiff recovers 20*l.* or upwards but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court.

(1) [1894] 2 Q. B. 329.

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taken. Here the plaintiff recovered in the action 27*l.* 18*s.* 5*d.* and 2*l.* 0*s.* 6*d.* He is, therefore, entitled to costs on 29*l.* 18*s.* 11*d.* It is clear that under s. 65 of the County Courts Act, 1888, the whole action is remitted to the county court.

[LAWRANCE J. There is a substantial distinction between *Keeble* v. *Bennett* (1) and this case, because in *Keeble* v. *Bennett* (1) the sum ordered to be paid by the defendant to the plaintiff was not dealt with in the High Court. There was no judgment for it, and no costs taxed in respect of it. Here the 27*l.* 18*s.* 5*d.* and costs were paid and finally disposed of in the High Court before the action got into the county court.]

The plaintiff here recovered 29*l.* 18*s.* 11*d.* in the action just as much as the plaintiff in *Keeble* v. *Bennett* (1) recovered 104*l.* in the action. [He also referred to *Welply* v. *Buhl* (2) and *D'Errico* v. *Samuel.* (3)]

DAY J. I think the decision of the registrar of the county court was right. He came to the conclusion, after careful consideration, that the plaintiff's costs ought to be taxed on the lower scale in use in the county courts. The action was brought to recover about 44*l.* The claim was reduced by the abandonment of part of it, and on an application under Order XIV. the district registrar of the High Court disposed of the claim as to 27*l.* 18*s.* 5*d.*, by giving the plaintiff leave to sign final judgment for it with costs to be taxed. That part of the claim was, therefore, finally disposed of; but there remained a sum of 2*l.* 0*s.* 6*d.* which was still claimed by the plaintiff. As to that sum, the district registrar's order was that the action should be remitted for trial to the Swansea County Court. It is clear that the action was remitted as to that sum only. The plaintiff obtained a judgment in the county court for that sum and costs, and thereupon he claimed to have his costs taxed on the higher scale according to Col. B. The question is whether, for the purpose of determining which scale of costs applies in respect of the recovery of the 2*l.* odd in the county court, the 27*l.* odd recovered in the High Court

(1) [1894] 2 Q. B. 329. (2) (1878) 3 Q. B. D. 80, 253.
(3) [1896] 1 Q. B. 163.

ought to be added to the 2*l.* To my mind the plaintiff is not entitled to add those sums together. He has not recovered 29*l.* odd in the county court; he has recovered 27*l.* in the High Court and 2*l.* odd in the county court. He is, therefore, in my opinion, only entitled to costs in the county court on the lower scale, which applies where the sum recovered exceeds 2*l.* but does not exceed 10*l.* I think that the registrar of the county court came to a correct decision, and I think that he was clearly right in the reasons he gave for distinguishing *Keeble* v. *Bennett*. (1) In that case no final judgment was signed in the High Court, no taxation of costs was had there, and there was no payment of costs. What was remitted to the county court was the claim for the whole amount; what was claimed was the whole amount, and that being so, the Divisional Court held that the taxation should be on the higher scale applying to the whole amount. I entirely assent to the result of that judgment. I am of opinion that the decision of the county court judge was wrong, and that this appeal should be allowed.

LAWRANCE J. I entirely agree, and I have nothing to add.

Judgment for appellants. Leave to appeal refused.

Solicitors for appellants: *Riddell, Vaizey, & Smith, for Viner, Leeder & Morris, Swansea.*

Solicitors for respondent: *Richard White, for Lawrence Richards, Swansea.*

(1) [1894] 2 Q. B. 329.

W. A.

1898
May 19.

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF MANSFIELD, APPELLANTS; BUTTERWORTH, RESPONDENT.

Local Government—Streets—Proposed Works—Objections—"Insufficient or Unreasonable," Construction of—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 7, 8.

An objection was taken to works of paving, levelling, sewering, and lighting a street proposed by an urban authority to be done under the Private Street Works Act, 1892, the ground of objection being that the proposed works were "insufficient" and "unreasonable" within the meaning of s. 7 (*d*). On the hearing of the objection before a court of summary jurisdiction it was proved that the works were necessary and proper in order that the street might be safely and conveniently used as a street; but the justices allowed the objections, holding that the works were insufficient, and therefore unreasonable, because the street at one point was too narrow, and the urban authority did not propose to take any steps to have it widened:—

Held, that the expression "insufficient" in s. 7 (*d*) limited the jurisdiction of the court of summary jurisdiction to determining whether or not the works were insufficient to effect the purpose proposed to be effected by them, and therefore that the justices' decision, being founded upon considerations which they ought not to have entertained, was wrong.

CASE stated under the Private Street Works Act, 1892 (55 & 56 Vict. c. 57), and the Summary Jurisdiction Acts, by five justices of the county of Nottingham.

Upon the hearing before the justices, sitting as a court of summary jurisdiction in and for the Mansfield Division of the county, of certain objections made by the respondent to private street works proposed to be done by the appellants, the following facts were proved or admitted:—

The appellants are the mayor, aldermen, and burgesses of the municipal borough of Mansfield, and are the urban sanitary authority under the Public Health Acts for such borough. The respondent is the agent for and on behalf of the trustees of a charity, who are the owners of a piece of land in the borough having a frontage abutting, for a length of about 200 yards, on a lane called "Quarry Lane" in the borough.

The Private Street Works Act, 1892, was adopted by the appellants, and came into force in 1894.

Quarry Lane is a street within the meaning of that Act. In 1896 the appellants resolved, under and in pursuance of s. 6 (1),

(1) The Private Street Works Act, 1892 (55 & 56 Vict. c. 57), s. 6: "(1.) Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); that is to say, to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street.

"(2.) The surveyor shall prepare, as respects each street or part of a street—

"(*a.*) A specification of the private street works referred to in the resolution, with plans and sections (if applicable);

"(*b.*) An estimate of the probable expenses of the works;

"(*c.*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

"Such specification, plans, sections, estimate and provisional apportionment . . . . shall be submitted to the urban authority, who may by resolution approve the same respectively with or without modification or addition as they think fit."

"(3.) The resolution approving the specifications, plans, and sections (if any) shall be published in the manner prescribed . . . . and copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment within seven days after the date of the first publication. During one month from the date of the first publication the approved specifications, plans, and sections (if any), estimates and provisional apportionments (or copies thereof certified by the surveyor) shall be kept deposited at the urban authority's offices, and shall be open to inspection at all reasonable times."

Sect. 7: "During the said month any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say,)

"(*a.*) That an alleged street or part of a street is not or does not form part of a street within the meaning of the Act;

"(*b.*) That a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large;

"(*c.*) That there has been some material informality, defect, or error in or in respect of the resolution, notice, plans, sections, or estimate;

"(*d.*) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive;"

((*e.*) and (*f.*) provide that other

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to do private street works—namely, to sewer, level, pave, metal, flag, channel, and make good, and to provide proper means for lighting, Quarry Lane. A specification of these works, with plans and sections, and an estimate of the probable expenses of the works, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith, was prepared by the appellants' surveyor, and approved by resolution of the appellants, and the resolution was published and copies thereof served on the owners of the premises liable to be charged, and the approved specification, plans, sections, estimate, and provisional apportionment were kept deposited at the appellants' offices in the manner prescribed by, and in all respects so as to comply with, the provisions of s. 6.

Within one month from the first publication of the resolution approving the specification, plans, &c., the respondent duly served on the appellants notice of objection on the ground "that the proposed works are insufficient and unreasonable, and that the estimated expenses are excessive."

The appellants duly complied with the provisions of s. 8, in order to have the respondent's objections heard and determined by a court of summary jurisdiction.

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objections, not material for the purposes of this report, may be made.)

Sect. 8: "(1.) The urban authority at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors, and at the time and place so appointed any such Court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be, and with the same powers and subject to the same provisions with respect to stating a case, as if the urban authority were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The Court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments or any of them, on the application either of any objector or of the urban authority. The Court may also, if it think fit, adjourn the hearing and direct any further notices to be given."

By s. 5, "The expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large."

Paragraph 6 of the case was as follows:—The proposed works were intended to be done over a part of the said street about 677 yards in length. For several years past there has been a considerable traffic, both vehicular and foot traffic, over and along such part of the said street, and such traffic has increased during the past twelve months, and is increasing, in consequence of the erection, which is still in progress, of a street of houses on land abutting on and adjoining Quarry Lane, but at a farther distance from Mansfield than the land belonging to the trustees. Vehicular traffic between the said new street of houses and Mansfield passes through Quarry Lane and over the portion thereof on which it is proposed to execute the works above referred to. There is no made roadway or footpath, and no foundation to the road, which is uneven with very deep ruts; but there is a footpath irregularly demarcated with rough stones. There are no sewers to carry off the sewage of the houses erected and in course of erection in the said new street, or of the houses adjoining Quarry Lane, and there is no provision for lighting it. In wet weather Quarry Lane is almost impassable, and it is frequently in a foundrous condition and dangerous to persons using it either by night or by day with horses and carts or on foot. The average width of the street during the 677 yards is about sixteen feet, and for several yards opposite the respondent's land the width is about twelve feet, inclusive of the rough footway referred to, which is three feet in width. At other points in the street where the respondent's land does not adjoin Quarry Lane its width is from fourteen feet six inches to sixteen feet.

It was admitted that the estimated expenses stated in the provisional apportionment were not excessive.

The justices were of opinion "that the proposed works were insufficient and unreasonable on the ground that the existing width of the highway—that is to say, nine feet roadway and three feet footway—at the point before mentioned was insufficient for a highway, and that such works, or any part thereof, ought not to be done unless and until the said street was made wider." They therefore, having visited and viewed Quarry Lane at this point, ordered and adjudged "that the said works

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were insufficient and unreasonable on the ground that such works involved the retention of the present width of the street without enlargement."

The question for the opinion of the Court was whether the justices could find, on the grounds above stated, that the proposed works were insufficient and unreasonable within the meaning of s. 7 (*d*) of the Private Street Works Act, 1892.

If the Court should be of opinion that the justices could so find, their order allowing the objections to be affirmed; if of the contrary opinion, the order to be quashed and the objections disallowed.

Appleton, for the appellants. Having regard to the findings of fact in paragraph 6 of the case, the justices cannot have meant that the proposed works were not sufficient and reasonable in order to make the street safe for persons using it with horses and carts or on foot. They have really held that the proposed works are insufficient, and therefore unreasonable, because they do not include a proposal to widen the street. The justices have gone beyond the jurisdiction given to them by the Act, which does not contain any provision enabling an urban authority to widen streets; their powers in that respect are given by the Public Health Act, 1875 (38 & 39 Vict. c. 55). The attempt to exercise those powers would, or might, involve an application, possibly unsuccessful, to the Local Government Board for permission to take land compulsorily under the Lands Clauses Consolidation Acts. The words "insufficient or unreasonable" in s. 7 (*d*) of the Act of 1892 mean insufficient or unreasonable having regard to the street as it exists; to the character, quality, and cost of the work proposed to be done on it, and to the traffic over it. Sect. 8 empowers the Court "to quash or amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them." "The resolution" referred to is the resolution of the urban authority approving the plans, &c.—not the original resolution to do private street works. The justices cannot, merely because they think it would be an improvement if the street were widened, find that it is unreasonable that works admittedly necessary in order to make it safe should be done upon it.

[The Court referred counsel to *Sheffield Corporation* v. *Anderson* (1), decided under the Sheffield Corporation Act, 1890 (53 & 54 Vict. c. ccxxv.), which contains sections substantially the same as ss. 6, 7, and 8 of the Private Street Works Act, 1892.]

That decision does not conflict with the construction contended for. The stipendiary magistrate there decided that it was unreasonable to lay down sewers in the street because the sewage was sufficiently provided for by sewers running at the backs of the houses—that is, he came to the conclusion that the street as it existed did not require sewering.

John Chester, for the respondent. The construction sought to be put upon s. 7, sub-s. (*d*), of the Act of 1892 is too narrow. The justices here thought that the increasing traffic over the street made it certain or very probable that the street must be widened shortly, and then the work would have to be done over again. They were entitled, upon that state of facts, to hold that it was unreasonable to do the proposed works now. There is nothing in the Act to cut down the meaning of the words "insufficient" and "unreasonable," in the way suggested. The parties might take into consideration the probable requirements of future vehicular traffic; they are not bound to limit their consideration to the traffic existing at the time the objections come before them; nor are they bound to consider only the quality and character of the work proposed to be done; they are entitled to hold that it is unreasonable that any works should be done at all until the street has been widened. The land necessary to widen it could probably be acquired by agreement, so that no application of the Lands Clauses Consolidation Acts would be necessary. The resolution which, under s. 8 of the Act of 1892, the justices have power to quash or amend may be the original resolution that private street works should be done on the street.

Appleton replied.

WILLS J. The questions raised in this case are of some difficulty. I have, however, been able to arrive at a tolerably clear conclusion, notwithstanding the apparent difficulty

(1) (1894) 64 L. J. (M.C.) 44.

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presented by some of the language used in the legislation with which we have to deal. The Private Street Works Act, 1892, provides that where any street is not, in the opinion of the urban authority, in a proper condition, they may resolve that certain works shall be done on it which comprehend the works proposed to be done in the present case. Then their surveyor is to prepare a specification with plans and sections, &c., which they may approve by resolution with or without modification or addition as they shall think fit. Upon that having been done, public notice is to be given; opportunities to object are to be afforded to the persons affected by the proposed works; and, finally, objections are to be heard before a court of summary jurisdiction. The nature and extent of the objections which may be urged, and of the matters which may be taken into consideration by the justices, are found in s. 7. Certain of the objections specified—two of them, (*a*) and (*b*), at all events—beyond all doubt go to the root of the whole scheme, because they are objections which, if the facts support them, go to establish a state of things in which the jurisdiction of the urban authority to pass either resolution never existed. It was very much the same under the Public Health Act, 1875. Under s. 150 of that Act the urban authority might pass a resolution with respect to paving and sewering streets, and might proceed to apportionment; but if they tried to enforce their apportionment, and it turned out that the thing which they called a street was not a street, the whole foundation of the proceedings failed, and the persons proceeded against escaped. Sect. 7 of the Act of 1892 undoubtedly preserves that class of objection. That, however, does not conclude the case. We have to see what, even if the objection is of that class, the justices have power to do. They have power, under s. 8, to quash "the resolution." Looking at the scheme of the sections which precede s. 8, and looking more particularly at the fact that under s. 7 there is a class of objections which can only apply to the plans, sections, &c., it is, I think, impossible to doubt that the whole of the justices' jurisdiction is to quash the resolution which has approved the plans and sections. The protection given to a person who ought not to be proceeded against because the place is not a

street is just as effectual as if the original resolution to do private street works were quashed, because by quashing the second resolution the first is made a resolution incapable of being carried into effect. I think that clauses (*a*) and (*b*) of s. 7 were intended simply to provide a cheap and summary remedy in cases where the urban authority proposed to do works upon a place in respect of which they had made the mistake of calling it a street when in reality it was not. That remedy is provided instead of the more elaborate and expensive proceeding which would be necessary in order to give the person sought to be charged the same protection under the Public Health Act, 1875. In the present case the objections with which we are specially concerned are two of those specified in clause (*d*) of s. 7, namely: "That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive." At first sight the objection of insufficiency which may be taken to "the proposed works" might seem to go to the root of the whole scheme, as do the objections specified in clauses (*a*) and (*b*). The language of clause (*d*) is, however, quite capable of the construction that the expression "the proposed works" means the works as proposed and specified in the resolution, and it seems to me more natural, looking at the class of objections provided for by clause (*d*), that in using the term "insufficient" Parliament did not intend to give the justices jurisdiction to interfere with the power of the urban authority to adopt, and definitively to adopt, the scheme as a whole—as a thing required to be done—but only intended to give jurisdiction in case that which the urban authority proposed to do should be found to be insufficient to carry out what was necessary to be done. I think "insufficient" means that the specified works are insufficient to carry out the purpose which is proposed to be effected by them; it does not mean that they are insufficient having regard to something which, if done, might make a better scheme for the neighbourhood in general; it does not enable the justices to take into consideration other things which are altogether outside the character of the works in respect of their sufficiency to produce the effect desired. The word

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"insufficient," in my opinion, points exclusively to a comparison between that which is proposed to be done and the means of effecting it. The word "unreasonable" has undoubtedly a wider meaning, and I think that it does give the justices jurisdiction to say whether, having regard to the scheme as a whole, it is reasonable or not that the proposed works should be done at all. That seems to follow from the decision of the Court of Appeal in *Sheffield Corporation* v. *Anderson* (1), where the Court held that a resolution approving plans for draining a street, the drainage of which the justices thought was already sufficiently provided for, might be quashed on the ground that it was unreasonable. There seems to be no reason to quarrel with such a construction. If the justices had found here that the works ought not to be done at all because they were not required for the purposes of the street used as a street, nor required for the purpose of draining the houses—if on that ground they had found that the works were unreasonable—I am of opinion that they would have had jurisdiction to disapprove of the scheme and to quash or amend the resolution approving the plans, &c. But after carefully considering what they have said, and what they have left unsaid, in the case, I think it is plain that they did not allow the objections before them upon any ground of that kind. Indeed, in paragraph 6 of the case they find that a state of things existed which would render the proposed works absolutely necessary if the street was to be safely and properly used as a street. They seem, however, to have thought that it would be a good thing to have the roadway made wider, and that by withholding their assent to the scheme and declaring that the proposed works as shewn on the plans were insufficient and unreasonable, they could put pressure on the urban authority and compel them to widen it. From their describing the works as insufficient, when it is admitted that they are proper for effecting what they propose to effect, and at no unreasonable cost, it is plain that the justices have misunderstood the limits of the expression "insufficient." They have acted upon considerations quite beyond their powers, as I think, with respect to the sufficiency of the

(1) 64 L. J. (M.C.) 44.

scheme for the good of the public in general. I think counsel for the appellants was right in saying that the ground upon which the justices held that the proposed works were unreasonable was the same as that upon which they held that the works were insufficient. They thought that the corporation ought to include in their improvements the widening of the street, which could only be done under powers other than any contained in the Act of 1892. They have asked us in terms to quash their order if it was made upon a wrong principle. I think that it was, and there is no reason to suppose that, if they had applied the right principle, they would not have disallowed the objections. I think, therefore, that their order must be quashed, and our judgment should be for the appellants.

KENNEDY J. I have come to the same conclusion, although my mind has fluctuated during the course of the argument. Reading the case fairly, I think that the justices have found that the proposed works were unreasonable because insufficient. Now, the insufficiency meant by the Act must, in my view, mean the insufficiency of the proposed works to carry out the object for which they are proposed. The justices have held that the proposed works were unreasonable, not in respect of the street as a street which wanted paving, sewering, and lighting, but because the scheme did not go further and say that the street should also be widened. That question seems to me to be outside their jurisdiction.

Judgment for the appellants.

Solicitors for appellants: *Torr, Gribble, Oddie & Sinclair, for J. Harrop White, Mansfield.*

Solicitors for respondent: *Gole & Co., for R. Pashley, Rotherham.*

W. A.

Applied. WILLIAMS v. LINNITT [1951] 1 K. B. 565

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May 18.

ORCHARD *v.* BUSH & CO.

Innkeeper—Liability—"Guest"—Loss of Property.

The plaintiff, being on his way from his place of business in Liverpool to his home outside the town, went into the dining-room of an hotel in Liverpool, kept by the defendants, to get a meal, and put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he had finished his meal. Sleeping accommodation for guests at the hotel was provided if required; but a great number of people used it every day for the purpose of dining there only:—

Held, that there was sufficient evidence to establish the relation of innkeeper and guest between the defendants and the plaintiff so as to make them liable for the loss of the coat without proof of negligence on their part.

APPEAL from a decision of the judge of the Liverpool County Court.

The action was for damages for the loss of a coat. The material facts proved or admitted before the county court judge were as follows:—

The defendants were innkeepers, keeping the Royal Court Hotel, Liverpool. Guests were accommodated at the hotel with sleeping-rooms if required; but from ninety to one hundred people, who were not staying at the hotel, dined in it every day. The plaintiff, who was in business in Liverpool but lived outside the town, went to the hotel for supper about 9 o'clock in the evening. He went into the dining-room and hung his overcoat upon a hook there, where coats were usually hung. He then left the room for a short time to speak to the manageress of the hotel; returned; had his supper, and, on leaving to catch a train home, found that his coat was missing.

The county court judge found that the plaintiff was not guilty of negligence in leaving the coat in the dining-room temporarily whilst he went to speak to the manageress.

The judge also found that the plaintiff was a guest of the hotel although he only came in for supper, and held that the defendants were responsible for the loss of the coat, and

accordingly gave judgment for the plaintiff for 1*l.* 15*s.*, its value. The defendants, by leave, appealed.

Montague Lush, for the defendants. There was no evidence before the county court judge upon which he could properly find that the plaintiff was a "guest" at the inn, so as to make the defendants liable, within the meaning which has been attached to that word by decided cases. The common law liability of an innkeeper was originally imposed in order to prevent him acting in collusion with the bad characters who in old times infested the roads, and to protect wayfarers and travellers who on their journeys brought goods to the inn. With that view he was placed in the position of an insurer of the goods of his guest, and correlative to his liability is his right of lien upon the goods. In order to be a "guest" at an inn a person must be a wayfarer or traveller. He must come there "causâ hospitandi," so that, in the words of the old writ, "pro defectu hospitatoris hospitibus damnum non eveniat ullo modo." These propositions are established by many of the older cases: *Calye's Case* (1); *Burgess* v. *Clements* (2); *Thompson* v. *Lacy* (3); *Dawson* v. *Chamney*. (4) The relation of innkeeper and guest must be clearly established in order to make the innkeeper's liability attach. Merely obtaining temporary refreshment is not enough: *Reg.* v. *Rymer* (5); *Strauss* v. *County Hotel Co.* (6) The guest must be a traveller, though he may only stay for part of a day: *Medawar* v. *Grand Hotel Co.* (7) If he loses the character of a traveller he may be turned out: *Lamond* v. *Richard*. (8) On the facts of the present case the plaintiff was not a traveller, nor received as a guest at the inn. He was using it, like many others did, as a restaurant for the purpose of obtaining a meal. The facts are like those in *Ultzen* v. *Nicholls* (9), where the plaintiff's right to recover was held to depend only upon a bailment of the coat which was lost, and

(1) (1584) 8 Co. Rep. 32; 1 Sm. L. C. 10th ed. 115.
(2) (1815) 4 M. & S. 306.
(3) (1820) 3 B. & A. 283.
(4) (1843) 5 Q. B. 164.
(5) (1877) 2 Q. B. D. 136.
(6) (1883) 12 Q. B. D. 27.
(7) [1891] 2 Q. B. 11; judgment of Lord Esher M.R., at p. 20.
(8) [1897] 1 Q. B. 541.
(9) [1894] 1 Q. B. 92.

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negligence by the bailee, the defendant. In *Bennett* v. *Mellor* (1), which may be relied on for the defendants here, the plaintiff was clearly a traveller. That decision, though it goes further than any other on this question, does not conclude this case. The defendants could have refused to admit the plaintiff for the purpose of dining.

Next, if the relation of innkeeper and guest did exist between the defendants and the plaintiff, the plaintiff never entrusted his coat into the charge of the defendants or their servants, and, therefore, the innkeeper's liability never attached to the defendants. If it be admitted that by providing pegs in the dining-room the defendants invited their customers to hang their coats upon them, the defendants were not guilty of any negligence, and therefore are not liable.

Horridge, for the plaintiff. It is clear from the evidence that the Royal Court Hotel was an inn, and that the defendants were innkeepers, and the county court judge has found that the plaintiff was a guest at the inn. The evidence also establishes that he was a traveller, being on his way home from his business in Liverpool to his residence outside. The defendants were, therefore, liable as innkeepers for the loss of the guest's coat. *Bennett* v. *Mellor* (1) is directly in point in the plaintiff's favour. It supports the proposition that it is not necessary, in order to constitute a man a "guest" at an inn, that he should have gone there for more than temporary refreshment. A man may even be a "guest" if he leaves his horse at the inn and goes himself to lodge elsewhere: *York* v. *Grindstone*. (2) The relation of innkeeper and guest is constituted if a person goes to the inn for the purpose of receiving such accommodation and services as are ordinarily given to guests. He is protected if he deposits his goods, as the plaintiff here did his coat, in a place to which such goods are usually taken in the inn: *Richmond* v. *Smith* (3); *Morgan* v. *Ravey*. (4) In *Reg.* v. *Rymer* (5) and *Strauss* v. *County Hotel Co.* (6) the

(1) (1793) 5 T. R. 273.
(2) (1704) 1 Salk. 388; 2 Ld. Raym. 866.
(3) (1828) 8 B. & C. 9.
(4) (1861) 6 H. & N. 265.
(5) 2 Q. B. D. 136.
(6) 12 Q. B. D. 27.

plaintiff went for refreshment to a place which was not part of the inn premises; and in *Ultzen* v. *Nicholls* (1) he went to a restaurant merely. Those cases, therefore, are wholly different from the present.

Montague Lush replied.

WILLS J. I am of opinion that this appeal should be dismissed. The real question is whether there was any evidence to justify the county court judge in finding that the plaintiff was a guest at the defendants' inn. Taking the narrower view, contended for by counsel for the defendants, of what is a guest, I fail to understand in what sense he was not a guest. The room he went into was the dining-room of the hotel. It is said that in order to make him a guest he must be a wayfarer and traveller. The facts are that he was on his way home; he was on his way to the station from which he travelled home by railway. Why was he not a wayfarer? If he had been riding to his home on horseback along a country road, and between the terminus a quo and the terminus ad quem he used an inn for the purpose of getting food for himself and his horse, he clearly would be a wayfarer and a guest at the inn. What difference does it make that he was not riding, as 100 years ago he probably would have been, but that he was walking to the railway station in order to take the train, and on the way called at an inn, and was received there and served with such refreshment as he required? But I do not take the more restricted view of what constitutes a guest at an inn. I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give. He need not stay the night. I confess I do not understand why he should not be a guest if he uses the inn as an inn for the purpose merely of getting a meal there. There is not much to be said, upon the authorities, for the proposition that a person, in order to be a guest at the inn, must be a wayfarer or traveller. I quite agree that in olden times wayfarers were more often "guests" than anybody else. The innkeeper's liability is said to arise because he receives persons causâ

(1) [1894] 1 Q. B. 92.

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hospitandi. I cannot see why he receives them less causâ hospitandi if he gives them refreshment for half a day, receiving them in the same way as other persons are received, than if they stay the night at his inn. It makes no difference that he receives a large number of people who only take a meal at the inn. He does receive them, and as an innkeeper, and his liability as an innkeeper thereupon attaches in respect of them. The present case is stronger than the case of the guest in *Bennett* v. *Mellor*. (1) There the person held to be a guest went to the inn for a purpose wholly unconnected with the business of the innkeeper as an innkeeper, and, whilst waiting for his answer about the business he had come upon, sat down and took temporary refreshment. He was treated as a guest of the inn because he had received refreshment in a public room which was part of the inn premises. There is nothing in the report of the case to shew where he was going after he left the inn. The use made of the inn by the plaintiff in the present case seems much more like use as a guest than the use in *Bennett* v. *Mellor*. (1) Our decision does not touch the point which would have arisen if the place to which the plaintiff went had been a restaurant not attached to or part of the hotel. The dining-room here was used as part of the inn, and used as such a room is used. What was supplied to the plaintiff was what was supplied by the innkeeper to his guests. I am of opinion that there was abundant evidence to support the finding of the county court judge. This appeal must be dismissed.

KENNEDY J. I agree. I also think there was abundant evidence to support the county court judge's finding. The defendant was an innkeeper, keeping the hotel as an inn. I am content to take Best J.'s definition of what is an inn in *Thompson* v. *Lacy* (2): "An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided." The house in question there was a London tavern where no coaches stopped, and there were no stables. It was contended that it was not an inn; but the

(1) 5 T. R. 273.

(2) 3 B. & A. 283.

Court held that that view was too narrow and was unreasonable. Bayley J. said: "I take the true definition of an inn to be, a house where the traveller is furnished with everything he has occasion for whilst on his way." The Royal Court Hotel, in the present case, unquestionably was an inn: it was a place in which the owner held himself out as ready to receive all travellers and sojourners, and to supply food and accommodation for them whether they stayed the night, or used it temporarily on their way. If so, the legal liability of an innkeeper attached to the defendants. It was said that the dining-room accommodated not only people who stayed at the hotel, but people who came there only for the purpose of getting a meal. There is scarcely an inn in the country where that is not done; and can it be said that the rights and liabilities of the innkeeper are thereby altered? I cannot think they are. The cases of a restaurant keeper, as in *Ultzen* v. *Nicholls* (1), or of a place kept separately from the hotel, as in *Reg.* v. *Rymer* (2), are perfectly different. In those cases a perfectly separate business was carried on in premises which did not form part of the inn. It was said that the plaintiff in the present case was not a traveller. The authorities give no definition of what is a traveller; but, looking at the reason of the thing, I should have thought that any person, who was neither an inhabitant of the house nor a private guest of the innkeeper or his family, but who came into the house as a guest to get such accommodation as it afforded and he was willing to pay for, was a traveller. It does not seem to me to make any difference whether his journey be a long or a short one. I agree that, on the facts of this case, the plaintiff was a traveller; but, apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn. I agree with what is said in the notes to *Calye's Case* (3): "It is not necessary in order that a man may be a guest, so as to fix the innkeeper with this sort of liability, that

(1) [1894] 1 Q. B. 92. (2) 2 Q. B. D. 136.
(3) 1 Sm. L. C. 10th ed. at p. 124.

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he should have come for more than a temporary refreshment." I think the judgment in the county court was right.

Appeal dismissed.

Solicitors for plaintiff: *Ockleshaw, Johnson & Co., for C. W. Tibbits, Liverpool.*

Solicitors for defendants: *Richard White, for H. F. Neale, Liverpool.*

W. A.

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May 12.

LEWIS AND LEWIS, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Agreement in Consideration of Fixed Quarterly Payments—"Bond, Covenant, or Instrument"—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched.*

By the first schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only, or principal, or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2*s.* 6*d.* for every 5*l.*, and also for any fractional part of 5*l.* of the annuity or sum periodically payable.

By a separation deed between a husband and wife the husband covenanted to pay the wife for her separate use without power of anticipation "the sum of 625*l.* every three months by quarterly payments on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year":—

Held, that the deed was a security for an annuity or yearly sum payable by quarterly instalments, and not for a sum of money payable at quarterly periods, and that it was therefore liable to ad valorem duty upon the amount of the annuity and not upon the sum payable quarterly.

Clifford v. *Inland Revenue Commissioners*, [1896] 2 Q. B. 187, distinguished.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39 (The Stamp Act, 1891), s. 13.

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LEWIS v. INLAND REVENUE COMMISSIONERS.

The instrument presented for the opinion of the commissioners was a deed of separation between a husband of the one part and a wife of the other part, duly executed by the parties thereto. The deed, after providing for a present separation between the parties, contained a clause, numbered 3, by which the husband undertook that he would during the life of the wife, if she should so long perform and observe the stipulations therein on her part contained, pay to her for her separate use without power of anticipation "the sum of 625*l.* every three months by quarterly payments on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments of 625*l.* to be paid in advance on the 29th day of September next." It was further provided that, if the parties should become reconciled and return to cohabitation, or if their marriage should be dissolved or they should be judicially separated by reason of anything done by either party after the date of the deed, the covenants, agreements, and stipulations contained in the deed should become void except in respect of proceedings for a breach previously committed.

It was admitted by the appellants that the deed was liable, under s. 4 (*a*) of the Stamp Act, 1891, to a duty of 10*s.* as a deed, and to duty by reference to the heading of charge in the schedule to the Act of "bond, covenant, or instrument of any kind whatsoever." They contended that the duty payable under this latter head was to be calculated on the amount payable quarterly, namely, 625*l.*; that clause 3 of the deed was a "covenant, being the only security for a sum or sums of money at stated periods," and that the sum periodically payable was 625*l.*, and the duty thereon 15*l.* 12*s.* 6*d.*

The commissioners were of opinion that the instrument was, as to clause 3, the only security for an annuity for the term of life, or at any rate for an indefinite period, that the amount of the annuity was 2500*l.*, and that ad valorem duty was payable at the rate of 2*s.* 6*d.* for every 5*l.* of the said sum of 2500*l.* They accordingly assessed the duty at 62*l.* 10*s.*, with a further duty of 10*s.* in respect of other matter contained in the deed.

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The questions for the opinion of the Court were—(1.) whether the instrument was chargeable with the duty of 62*l.* 10*s.* and 10*s.* in accordance with the assessment of the commissioners; and (2.), if not, with what duty it was chargeable.

Rowden (*A. T. Lawrence, Q.C.*, with him), for the appellants. The deed is not the only, or principal, or primary security for an annuity. It does not purport to deal with annual payments; and although it is on the face of it an agreement for an indefinite period, there is nothing in it to prevent the resumption of cohabitation by the parties at any time, however soon, after the date of the deed. When properly construed, the deed does not contemplate the payment of an annual sum by quarterly instalments, but the payment of a fixed sum at stated periods—that is, every quarter. The case is in effect governed by the decision in *Clifford* v. *Inland Revenue Commissioners* (1), where stamp duty was held to be assessable upon a sum payable weekly; it is distinguishable from *Jones* v. *Inland Revenue Commissioners* (2), in which case the agreement provided in terms for the payment of an annual sum by quarterly instalments. The duty should, therefore, be assessed upon the sum "periodically payable"—that is, upon the sum payable quarterly.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Danckwerts*, for the respondents, were not called upon to argue.

WRIGHT J. Without presuming to question the authority of the case of *Clifford* v. *Inland Revenue Commissioners* (1), which of course binds us if it applies upon its facts and grounds to the present case, it seems to me that this case is not within the scope of that decision at all. Looking at the document in that case, the Court came to the conclusion that it was an agreement for payments by the period of a week. Applying the same principle to this case, and looking at the document, I think one gathers from it that it is an agreement for the payment of an annuity, because it uses the words, not merely 625*l.* every three months, but "625*l.* every three months by quarterly

(1) [1896] 2 Q. B. 187. (2) [1895] 1 Q. B. 484.

payments on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June." It seems to me simply a roundabout way of saying, "625*l.* four times in a year." I think that is the true meaning of the deed. It therefore is an annuity; and as it is for a term of life or other indefinite period, the decision of the commissioners was right.

I may mention that it is pointed out in Mr. Dowell's book (1) that prior to 1870 the duty was 2*l.* for every 100*l.* annually payable; the present amount seems to have been a modification of that, so as to apportion the duty more closely to the amount of the annuity. There is no reason to think that the intention of the clause was different.

PHILLIMORE J. I am entirely of the same opinion.

Appeal dismissed.

Solicitors for appellants: *Lewis & Lewis.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) See Dowell on Stamp Duties (ed. 1873), p. 194.

W. J. B.

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May 12.

THE OLD BATTERSEA AND DISTRICT BUILDING SOCIETY, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Mortgage—Reconveyance to Building Society — Building Societies Act, 1874 (37 *&* 38 *Vict. c.* 42), *ss.* 41, 42—*Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Sched. I.*

A reconveyance by a building society incorporated under the Building Societies Act, 1874, to the mortgagor is exempt from stamp duty by virtue of s. 41 of that Act; nor is the right to exemption lost by reason of the trustees for the purpose of the dissolution of the society being joined as parties to the reconveyance.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39 (The Stamp Act, 1891), s. 13.

The instrument presented for the opinion of the commissioners was dated in 1898, and was a reconveyance to the mortgagor of premises mortgaged by him to a building society duly incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42); it was indorsed upon another instrument dated in 1891, which was a mortgage of certain property to the society to secure repayment of a sum of 500*l.* advanced by the society to the mortgagor. At the date of the reconveyance the society was in process of dissolution, and three persons had been appointed trustees for the special purpose of carrying out the dissolution of the society under an instrument of dissolution executed under the provisions of the Building Societies Act, 1874. The reconveyance, which was expressed to be made between the society of the first part, the three trustees of the second part, and the mortgagor of the third part, witnessed that, in consideration of all the moneys secured by the mortgage having been paid by the mortgagor, the society, as mortgagee, surrendered and released, and the trustees confirmed, to the mortgagor the hereditaments and premises comprised in the mortgage, &c.

Sect. 41 of the Building Societies Act, 1874, contains an exemption from stamp duty in the following terms: "No rules of any society under this Act, nor any copy thereof, nor any

power, warrant, or letter of attorney granted or to be granted by any person as trustee for the society for the transfer of any share in the public funds standing in his name, nor any receipts given for any dividend in any public stock or fund, or interest of exchequer bills, nor any receipt, nor any entry in any book of receipt, for money deposited in the funds of the society, nor for any money received by any member, his executors or administrators, assigns, or attorneys, from the funds of the society, nor any transfer of any share, nor any bond or other security to be given to or on account of the society, or by any officer thereof, nor any order on any officer for payment of money to any member, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorized to be given, issued, signed, made, or produced in pursuance of this Act, or of the rules of the society, shall be subject or liable to or charged with any stamp duty or duties whatsoever, provided that the exemption shall not extend to any mortgage."

By s. 42 of the same Act it is provided that "When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may indorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or resurrender whatever . . . ." (1)

(1) The following is the form of receipt to be indorsed on a mortgage as given in the schedule to the Building Societies Act, 1874:—

"The —— Building Society hereby acknowledge to have received all moneys intended to be secured by the within [*or* above] written deed.

"In witness whereof the seal of the society is hereto affixed this —— day

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OLD BATTERSEA AND DISTRICT BUILDING SOCIETY v. INLAND REVENUE COMMISSIONERS.

It was contended on behalf of the society that the instrument was an instrument or document required or authorized to be given, issued, signed, made or produced in pursuance of the Building Societies Act, as being authorized by s. 42, and was therefore within the exemption from stamp duty contained in s. 41, and that it was immaterial, so far as the right to exemption was concerned, whether the mortgage was vacated by a formal instrument of reconveyance or by the form of receipt set out in the schedule to the Act.

The commissioners were of opinion that the proviso at the end of s. 41 referred either to any mortgage transaction, or else should be construed as applying to such instruments as are chargeable with stamp duty under the head "Mortgage" in the charging schedule to the Stamp Act, and as therefore making the exemption under that section inapplicable to any instrument executed in connection with a mortgage; that if upon the repayment of money secured by a mortgage to a building society the receipt in the form given in the schedule to the Building Societies Act were used, that receipt would be exempt from stamp duty as falling within exemption No. 11 under the head "Receipt" in the first schedule to the Stamp Act, 1891, in favour of a receipt indorsed or otherwise written upon an instrument liable to stamp duty and duly stamped acknowledging the receipt of any principal money thereby secured or therein mentioned. They accordingly regarded the instrument as chargeable under the head "Mortgage, &c." (5.), in the first schedule to the Stamp Act, 1891, with duty at the rate of 6*d.* for every 100*l.* of the amount secured by the mortgage, and assessed the duty of 2*s.* 6*d.* thereon. (1)

The questions for the Court were: (1.) Whether the instru-

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of —— by order of the board of directors [*or* committee of management] in presence of

"——, Secretary [*or* Manager]. (L.S.)

"[*Other witnesses, if any required by the rules of the society.*]"

(1) Under paragraph 5 of the heading "Mortgage, Bond, Debenture, Covenant," in the first schedule to the Stamp Act, 1891, "Reconveyance, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured," is made liable to an ad valorem duty of 6*d.* per cent.

ment was chargeable with the duty of 2*s.* 6*d.*; (2.) if not, with what amount of duty it was chargeable, or whether it was exempt from duty.

Archibald J. Allen, for the appellants. A reconveyance by a building society on payment off of the mortgage debt is an instrument authorized to be made in pursuance of the Building Societies Act, 1874, and therefore comes within the exemption from stamp duty contained in s. 41 of that Act. It is not affected by the proviso at the end of the section, for a "mortgage" does not include a reconveyance. A reconveyance and a receipt indorsed on the mortgage are merely alternative modes of procedure, and the latter, being admittedly exempt from stamp duty, it would be anomalous if the former required a stamp; the liability to duty does not depend upon the alternative adopted in a particular case. The duty must be imposed in clear terms, and no intendments can be made in favour of liability. The joinder of the trustees as parties was rendered necessary owing to the special form of receipt given in the Act of 1874 not appearing to apply to societies in process of dissolution; it can make no difference as to the liability of the instrument to stamp duty. [He referred to *Walker* v. *Giles* (1); *Fourth City Mutual Benefit Building Society* v. *Williams.* (2)]

The Solicitor-General (*Sir R. B. Finlay Q.C.*), (*Danckwerts* with him), for the respondents. A reconveyance comes within the proviso at the end of s. 41 that the exemption is not to extend to any mortgage; the true meaning of that proviso is that the exemption does not apply to any instrument comprised under the heading of "Mortgage" in the Stamp Acts. The instrument is therefore chargeable as a "reconveyance" under paragraph 5 of the heading "Mortgage, Bond, Debenture, Covenant" in the schedule to the Stamp Act, 1891, with ad valorem duty at the rate of 6*d.* for every 100*l.* Secondly, apart from the effect of the proviso, the instrument does not come within the exemption at all. As far as the trustees are concerned this is a common law reconveyance, executed after the making of the instrument of dissolution for the purpose of

(1) (1848) 6 C. B. 662. (2) (1879) 14 Ch. D. 140.

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revesting the property in the mortgagor; it is therefore not within the exemption in favour of instruments authorized to be made in pursuance of the Act of 1874.

WRIGHT J. I am of opinion that this appeal should be allowed. As regards the last point, I cannot think there is any substance in it. There was a mortgage to the society, and the trustees for the purpose of the dissolution of the society were made parties to the reconveyance when the mortgage was paid off. I do not think that it is the less a reconveyance by the society because the formalities are carried out in that way.

Then as to the substance of the case, it seems to me plain that the reconveyance indorsed on the mortgage was a document "authorized to be signed, made or produced in pursuance of the Act or by the rules of the society," and that it is within the exemption from stamp duty, unless it comes under the word "mortgage" in the proviso to s. 41. The Solicitor-General's proposition is that that proviso preventing the exemption from stamp duty applies to everything coming under the head of "mortgage" in the Stamp Act. The first observation I make upon that is that possibly it might be so if the heading in the Stamp Act were "mortgage," but it is not. It is not "mortgage," but "mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment;" and this title is subdivided into five heads. I cannot say that a reconveyance per se is within the word "mortgage" in that heading, any more than it is within the other words; indeed, I should have thought a reconveyance was not a mortgage. Apart from the contention based upon the word "reconveyance" coming under the head of "mortgage" as coupled with the other words in that heading of the schedule, no argument has been addressed to us to shew that the word "mortgage" in s. 41 of the Building Societies Act would include a reconveyance, and I think we should be straining the language if we were to hold that it did.

PHILLIMORE J. I am of the same opinion. With regard to the first point, it does not seem to me that the addition of the

trustees to the reconveyance by the society makes it otherwise than a document "required or authorized to be given . . . . in pursuance of this Act or of the rules of the society." On reflection—I am not sure that I am right—I come to the conclusion that the only reason they are made parties is that they are witnesses to the common seal of the society. Of course they are made parties as explaining why they, and not the secretary, are the proper witnesses to the affixing of the seal. At the utmost they are concurring parties, and I think that the document is a document authorized under the rules of the society.

With regard to the second point, I do not know that I quite appreciate the contention of the commissioners. I gather that it is said that the proviso reads in this way: "provided the exemption shall not extend to any documents which are taxed under the Stamp Act under the head 'mortgage.'" That seems to me a rather violent construction, and I ask myself whether that means that the Stamp Act is to be read as one with the Building Societies Act; because, if so, s. 105 of the Stamp Act, 1870, and s. 86 of the Stamp Act, 1891, contain definitions of mortgage which plainly do not include a reconveyance. Therefore I think the decision of the commissioners was wrong.

Appeal allowed.

Solicitors for appellants: *Corsellis, Mossop & Berney.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

1898
March 25.

COPPEN *v.* MOORE (No. 1).

Trade-mark—Merchandise Marks Act, 1887 (50 & 51 *Vict.* c. 28), s. 2, *sub-s.* 2 *—False Trade Description, Application of—Oral Statement—Description in Invoice written at Purchaser's Request.*

The provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely oral.

The respondent asked a salesman in the appellant's shop for a small English ham; the salesman pointed to some American hams on a shelf, and said, "These are Scotch hams"; the respondent chose one, which was weighed, and an invoice which did not contain the word "Scotch" was handed to the respondent by another assistant. The respondent told the assistant to put the word "Scotch" on the invoice, as he had bought the ham as such; the assistant did so, and handed the invoice to the respondent, who then paid the amount:—

Held, that the description in the invoice was a false trade description sufficient to satisfy the statute.

Case stated by justices of Richmond, in the county of Surrey

The appellant had been summoned to answer an information under s. 2, sub-s. 2, of the Merchandise Marks Act, 1887 (1), charging him with having unlawfully sold certain goods, to wit, American ham, to which a false trade description, to wit, Scotch ham, was applied. The facts were in substance as follows:—

John Moore, an inspector of the Bacon Curers' Association

(1) By 50 & 51 Vict. c. 28 (The Merchandise Marks Act, 1887), s. 2, sub-s. 2, "Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark or trade description; and

(*b*) That on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act.

of Great Britain and Ireland, accompanied by a man named Ward, went to the appellant's place of business in Richmond (one of several places of business of the appellant in different localities), and asked one of his salesmen, named Meslin, whom he met at the door, for a small English ham; the latter pointed to a number of American hams on a shelf outside the shop window and said, "Those are Scotch hams"; on being asked the price, Meslin said it was 8½*d.* a pound; Moore chose a ham, and Meslin passed it through the open shop window to another assistant named Wheeler, and said, "Weigh up Scotch ham, 8½*d.*" Wheeler weighed it and said it came to 5*s.* 5½*d.* Moore then asked Wheeler to make him out an account and to put on it "Scotch ham," as he bought it as such. Wheeler handed Moore an invoice which at the time had not the word "Scotch" on it. Moore did not take it, but told Wheeler to put the word "Scotch" on it, as he had bought the ham as such. Wheeler did so and handed Moore the account, which he then paid. Moore then told Wheeler who he was, and asked if he still said it was a Scotch ham, and Wheeler answered, "No, it's an American." Meslin was then called in, and, on being told by Wheeler who he was, admitted that it was an American ham. The manager, who was called in, said the same, and added that the assistants had no right to sell the ham as Scotch. It was stated by Moore in his evidence that 8*d.* per lb. would be a fair price for this ham, while Scotch hams were worth 1*s.* a lb., and that the ham was so dressed as to deceive the public.

The appellant proved that he was the owner of six shops in different places, and that he was not at the shop in Richmond on the day in question. He had on February 25, 1897, sent out a notice to the managers of his various places of business, including the one at Richmond, which was in the following terms:—

"Most important.

"Please instruct your assistants most explicitly that the hams described in list as breakfast hams must not be sold under any specific name of place or origin. That is to say, they must not

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be described as 'Bristol,' 'Bath,' 'Wiltshire,' or any such title, but simply as breakfast hams. Please sign and return.

"H. W. Coppen."

At the foot were the initials "E. B.," being the initials of the manager of the Richmond business.

The contents of this notice had been communicated by the manager of the shop to the assistants.

The respondent contended that the giving of the invoice was applying a false trade description, that intention to defraud was unnecessary, that the appellant, being the vendor, had warranted the ham as a Scotch ham within the meaning of s. 17 of the Merchandise Marks Act, 1887, and that he was responsible for the acts of his servants, and had not brought himself within any of the exceptions in the Act.

The appellant contended that a verbal statement did not constitute the application of a false trade description within the meaning of the Act; that the word "Scotch" having been put upon the invoice at the purchaser's request, no offence was committed in so putting it there; that if any offence had been committed by his servants the appellant was not personally liable, as it had been committed in his absence, without his knowledge, and against his express instructions; and that the appellant had taken all reasonable precautions against the commission of an offence against the Act.

The justices were of opinion that the appellant was guilty of the offence of having unlawfully sold a ham to which a false trade description was applied, and that he had not taken all reasonable precautions against committing an offence against the Acts, and inflicted a fine of 5*l*.

The question for the opinion of the Court was whether upon the facts the justices came to a correct determination and decision in point of law. (1)

Bonsey, for the appellant. No offence was in fact committed. An invoice may, no doubt, amount to a false trade description:

(1) At the same time both the appellant's assistants were convicted, the one of applying, and the other of causing to be applied, a false trade description; but the convictions were not appealed against.

Budd v. *Lucas* (1); but here the word "Scotch" was put on the invoice at the direct request of the customer after the sale was complete, and that cannot be a false trade description within the meaning of the Act.

[WRIGHT J. Is not the verbal use of a false trade description sufficient to satisfy s. 5, sub-s. 1 (*d*)? (2)]

No; the section clearly means that the description "applied" to goods must be something ejusdem generis with a mark, and under s. 2, sub-s. 2, the offence consists in exposing for sale goods to which the false trade description is applied.

[He was stopped by the Court.]

Buszard, *Q.C.*, and *A. J. David*, for the respondent. The Act applies to verbal statements. It is true that the title of the Act speaks of amending the law as to fraudulent marks "on merchandise," but the title is not to be read into the Act or so interpreted as to limit its scope. In s. 3, sub-s. 1, "trade description" is defined as meaning "any description, statement, or other indication, direct or indirect . . . . as to the place or country in which any goods were made or produced," and there is no reason why this section or s. 5, sub-s. 1 (*d*), should be limited to descriptions in writing. In any case, there was here an invoice containing a false trade description within the decision in *Budd* v. *Lucas*. (1) The sale was not complete until the invoice was made out and the money paid, and it is immaterial that the word "Scotch" was put on the invoice at the purchaser's request; it amounted to "applying" a false trade description within the meaning of the Act.

Bonsey, in reply. The case of *Budd* v. *Lucas* (1) did not decide that in all cases an invoice was an application of a trade description, but only that the giving of an invoice was a fact that must be taken into consideration in deciding whether a false trade description had been applied. Further, there is nothing to take this case out of the ordinary rule that a master

(1) [1891] 1 Q. B. 408.

(2) By s. 5, sub-s. 1 (*d*), "A person shall be deemed to apply a trade-mark or mark or trade description to goods who uses a trade-mark or mark or trade description in any manner calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade-mark or mark or trade description."

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is not criminally responsible for the unauthorized act of his servant; the very point was raised in *Budd* v. *Lucas* (1), and the Court expressed the opinion that there was nothing in the present Act to alter the general rule of law on that head. [He also cited *Cooper* v. *Slade*. (2)]

WRIGHT J. In my opinion the provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, do not apply in the case of a trade description which is wholly verbal. The whole framework of the statute, with the exception of s. 20, points to the necessity for a written or printed mark, or a physical mark in some other sense than a purely oral description. There is no decision, nor even a suggestion, to the contrary in any reported case, and I think that the section deals with marks and marks only. The sub-section is aimed at persons who sell, or expose for sale, or have in their possession for sale or any purpose of trade or manufacture, goods or things to which a forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied; the language seems clearly to deal with the special cases of the employment of some visible or physical mark which is calculated to affect the sale of the goods, and not to apply to cases of mere verbal description. Where a merely verbal description is the subject of complaint, there is no reason why proceedings should not be taken under the Sale of Food and Drugs Acts, and we are in no way impairing the security given by the Legislature to the public in so holding.

Then comes the question whether, in the present case, the description was anything more than verbal; I think that there was a description in writing. Before the prosecutor would consent to the property passing to him, he insisted that the trade description "Scotch" must appear on the invoice, and the word was accordingly written by the assistant; there was, therefore, in my opinion a sufficient trade description to satisfy the statute. The decision in *Budd* v. *Lucas* (1) is a strong authority to that effect.

(1) [1891] 1 Q. B. 408. (2) (1858) 6 H. L. C. 746.

The next point was that the appellant was exempt on the ground that he had taken all reasonable precautions against committing an offence against the Act; but on this point it is not open to us to question the finding of fact by the justices that he had not taken all reasonable precautions. It cannot be expected that the justices should say what other precautions he ought to have taken; they evidently thought that the appellant was aware of the habit and practice of his servants.

Then comes the question whether under this statute the employer can be punished for the unauthorized act of his servant; it would undoubtedly be a strong thing to hold that he would be liable on an indictment to imprisonment with hard labour for the act of his servant done without his authority. It must be taken that the justices thought that he was no party to the act. This raises so very important a question, especially when regard is had to the opinion expressed by the Court in *Budd* v. *Lucas* (1), that I think it desirable that, with the sanction of the Lord Chief Justice, the point should be argued before a special Court. (2)

DARLING J. I am of the same opinion.

Judgment accordingly.

Solicitors for appellant: *Neve & Beck.*
Solicitors for respondent: *Weekes & Co.*

(1) [1891] 1 Q. B. 408. (2) See next case.

W. J. B.

Dictum of LORD RUSSELL OF KILLOWEN, C.J., at p. 314, *not followed.* SLATCHER *v.* GEORGE MENCE SMITH, LTD. [1951] 2 All E.R. 388.

1898

April 4; *May* 14.

COPPEN *v.* MOORE (No. 2).

Master and Servant—Criminal Liability of Master for Act of Servant—Sale of Goods to which False Trade Description is applied—Merchandise Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

The provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a forged trade-mark or false trade description is applied, make a master criminally liable for acts done by his servants in contravention of the section when acting within the general scope of their employment, although contrary to their master's orders, unless the master can shew that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission of offences by his servants.

ARGUMENT of point reserved by a Divisional Court upon the hearing of a case stated by a metropolitan police magistrate.

The facts are fully stated in the preceding report.

Asquith, Q.C. (*Bonsey* with him), for the appellant. The conviction should be quashed. The general rule that a master is not criminally liable for the unauthorized acts of his servants applies to the present statute, and the only difficulty arises from the fact that in interpreting different statutes various exceptions have been engrafted on the rule. In *Reg.* v. *Stephens* (1) it was held that the principal was liable for the act of his agent in obstructing the navigation of a public river by casting rubbish into it; but this proceeded upon the ground that the proceeding was criminal in form only, and was in substance civil. In *Newman* v. *Jones* (2), the trustees and managing committee of a club were held not to be criminally responsible for the act of their steward in selling intoxicating liquors contrary to their orders to persons who were not members. In *Bond* v. *Evans* (3) a licensed person was held criminally responsible for the act of his servant in suffering gaming on the premises; but in that case the servant had been placed in

(1) (1866) L. R. 1 Q. B. 702. (2) (1886) 17 Q. B. D. 132.
(3) (1888) 21 Q. B. D. 249.

charge of the premises and the master's authority had been delegated to him, on which ground the case is distinguishable from *Somerset* v. *Hart* (1) and *Somerset* v. *Wade* (2), in the former of which cases it was held that a licensed person could not be convicted of suffering gaming which had taken place without his knowledge but to the knowledge of his servant, and in the latter that he could not be convicted of permitting drunkenness if he was in fact ignorant that the person was drunk. In *Mullins* v. *Collins* (3) a licensed person was held liable for the act of his servant in knowingly supplying liquor to a constable on duty; but this decision proceeded on the ground of its being a serious offence against public order. The master has been held not liable where his stoker negligently used a furnace so that the smoke was not consumed: *Chisholm* v. *Doulton* (4), and where a representation was made by his servant without his knowledge as to the weight of coal: *Roberts* v. *Woodward*. (5) [He also cited *Reg.* v. *Holbrook* (6); *Massey* v. *Morriss* (7); *Sherras* v. *De Rutzen* (8); *Commissioners of Police* v. *Cartman* (9); *Derbyshire* v. *Houliston* (10); *Kearley* v. *Tylor* (11); *Brown* v. *Foot*. (12)]

Upon the present sub-section there is no direct authority, although in *Budd* v. *Lucas* (13) there is a strong expression of opinion by the Court that the master is not criminally responsible for his servant's unauthorized acts. There is nothing in the statute itself to require the Court to hold that the ordinary presumption of law does not apply. The important penal clause is s. 2—sub-s. 1 of which deals with persons who themselves apply the false trade description, and to a charge under this sub-section it is a complete defence if the accused can shew that he acted without intent to defraud; there can be no clearer indication of the intention of the Legislature to make the condition

(1) (1884) 12 Q. B. D. 360.
(2) [1894] 1 Q. B. 574.
(3) (1874) L. R. 9 Q. B. 292.
(4) (1889) 22 Q. B. D. 736.
(5) (1890) 25 Q. B. D. 412.
(6) (1877) 3 Q. B. D. 60.
(7) [1894] 2 Q. B. 412.
(8) [1895] 1 Q. B. 918.
(9) [1896] 1 Q. B. 655.
(10) [1897] 1 Q. B. 772.
(11) (1891) 65 L. T. 261.
(12) (1892) 66 L. T. 649.
(13) [1891] 1 Q. B. 408.

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of mind the criterion of whether a criminal offence has been committed. Sub-s. 2 (1) applies to the case of a person selling or receiving into his possession goods to which a false trade description has already been applied; in the present case the false trade description, if applied at all, was not applied until after the contract of sale was complete. The finding of the justices that the appellant had not taken all reasonable precautions is wholly irrelevant.

Jelf, Q.C. (*A. J. David* with him), for the respondent. The appellant was properly convicted. The expression in s. 2, sub-s. 2, "to which a trade description *is* applied," is wide enough to include the liability of the master where somebody else has applied the false trade description. Accepting the general proposition that a man is not as a rule criminally responsible for the unauthorized act of his servant, the object of the Act must be regarded: that object was the protection of legitimate trade by preventing the sale of goods under false trade descriptions. The effect of s. 2, sub-s. 2, may not be to render the master criminally liable in every case for his servant's acts, but it at any rate shifts the onus of proof, and imposes upon the master the burden of shewing that he had acted innocently or without fraudulent intent. He may excuse himself under paragraphs (*a*) and (*b*) by shewing that he had taken all reasonable precautions against committing an offence, and had no reason to suspect the genuineness of the trade description, and

(1) By s. 2, sub-s. 2, of the Act, "Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) That having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and

(*b*) That on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) That otherwise he had acted innocently;

be guilty of an offence against this Act."

had given all the information in his power to the prosecutor; if he cannot for any sufficient reason comply with these requirements, then he may excuse himself under (*c*) by shewing that otherwise he had acted innocently. Here the appellant has clearly not complied with (*a*), for the justices have found affirmatively that he had not taken all reasonable precautions against committing an offence against the Act, and there is no finding under (*c*) that he had otherwise acted innocently.

Bonsey, in reply, referred to the judgment of Wills J. in *Reg.* v. *Tolson*. (1)

Cur. adv. vult.

May 14. The judgment of the Court (Lord Russell of Killowen C.J., Sir F. H. Jeune P., Chitty L.J., Wright, Darling, and Channell JJ.) was read by

LORD RUSSELL of KILLOWEN C.J. This is a case stated by justices, who summarily convicted the appellant of an offence against the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

The appellant was charged under s. 2, sub-s. 2, with having sold goods to which a "false trade description" was applied. The facts were as follows:—

On September 4, 1897, the respondent, at the London Supply Stores, 42, George Street, Richmond (one of several places of business of the appellant), asked the salesman at the door of the shop for a small English ham. The salesman pointed to a number of hams on a shelf, and said they were Scotch hams. In fact they were long-cut American hams. The salesman stated the price, 8½*d.* per lb., and the respondent said he would take one, which was then produced. The salesman then passed the ham selected through the open window to a shop assistant inside, saying, "Weigh up Scotch ham, 8½*d.*" The respondent, before paying, asked the assistant to make him out an account and put on it "Scotch ham," as he had bought it as such. The assistant at first handed the respondent an invoice without the word "Scotch" on it. The respondent did not accept it so written, but told the assistant to put the word "Scotch,"

(1) (1889) 23 Q. B. D. 168.

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"as he had bought it as such." The assistant then did so, and handed the invoice to the respondent, who then paid the price, 5*s.* 5½*d.* Upon this being done, the respondent asked the assistant whether he still said it was a Scotch ham whereupon the assistant admitted it was not, but was an American ham. The salesman, in like manner, was asked, and he at once admitted it was an American ham.

On the part of the appellant evidence was given that he had sent out a notice to all his branch places of business, including that in question, in the following terms:—

"February 25th, 1897.

"Most important.

"Please instruct your assistants most explicitly that the hams described in list as breakfast hams must not be sold under any specific name of place or origin. That is to say, they must not be described as 'Bristol,' 'Bath,' 'Wiltshire,' or any such title, but simply as breakfast hams. Please sign and return.

"H. W. Coppen."

The ham in question would come within the category of breakfast hams. Evidence was given that the terms of this notice were communicated to the manager and assistants, and the appellant stated that he had no reason to believe that his instructions were not being carried out.

It is now necessary to consider the statute in question and its application to the facts proved. Sect. 2 is the important section. Sub-s. 1 deals with the forging of any trade-mark and with the false application to goods of any such mark, or of any false trade description, and enacts that subject to the provisions of the Act an offence shall have been committed by such forging or application unless the party charged proves that he acted without intent to defraud. Sub-s. 2 enacts (omitting words immaterial in this case) that every person who sells any goods to which any false trade description is applied shall be guilty of an offence against the Act unless he proves (*a*) that having taken all reasonable precautions he had no reason to suspect the genuineness of the trade description; and (*b*) that

on demand duly made he gave all information in his power with respect to the persons from whom he obtained such goods; *or* (*c*) that otherwise he had acted innocently. By s. 3 it is enacted that trade description shall mean any description, statement, or other indication, direct or indirect, as to (amongst other things) the place or country in which any goods were made or produced. Later in such section it is enacted that the expression "false trade description" shall mean a trade description false in any material respect as regards the goods to which it is applied. By s. 5, sub-s. 1, it is enacted (inter alia) that a person shall be deemed to apply a trade description to goods who applies it to the goods themselves, or uses a trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.

In *Budd* v. *Lucas* (1) it was decided that where certain casks of beer were delivered accompanied by an invoice, in which the casks were falsely described as "barrels" (which word had acquired the character of a trade description), an offence under s. 2, sub-s. 1, of the Act in question had been committed, although the invoice containing the false description was not physically attached to the casks. We think this case was well decided: in other words, we think that it is not necessary to constitute the offence that there shall be any physical connection between the false trade description and the goods to which it is applied. It was admitted that the description "Scotch ham" was a trade description, and it is found that it was applied to the ham sold by the appellant's employees, and it was admittedly false. It was not contended that it was not material. In these circumstances it is clear that an offence against the Act was committed by the salesman and by the assistant of the appellant. But the question which the Court is now called upon to decide is whether the appellant also is not personally liable to be convicted. This was the question argued before us.

The appellant's contention was that the charge here preferred

(1) [1891] 1 Q. B. 408.

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was a criminal charge, and that the general principle of law applied, "Nemo reus est nisi mens sit rea." There is no doubt that this is the general rule, but it is subject to exceptions, and the question here is whether the present case falls within the rule or within the exception. Apart from statute, exceptions have been engrafted upon the rule: for example, in the case of *Reg.* v. *Stephens* (1) the defendant was held liable on an indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by him but managed by his son, although it was proved that the men employed at the quarry had been by order prohibited from doing the acts complained of. No doubt in that case the fact that the proceedings were only in form criminal was adverted to by the judges who decided it, but the fact remains that the defendant was criminally indicted. But by far the greater number of exceptions engrafted upon the general rule are cases in which it has been decided that by various statutes criminal responsibility has been put upon masters for the acts of their servants. Amongst such cases is *Mullins* v. *Collins* (2), where a licensed victualler was convicted of an offence under s. 16 of the Licensing Act, 1872, for supplying liquor to a constable on duty, although this was done by his servant without the knowledge of the master. Again, in *Bond* v. *Evans* (3), a licensed victualler was convicted of an offence against s. 17 of the same Act, where gaming had been allowed in the licensed premises by the servant in charge of the premises although without the knowledge of his master. The decisions in these and in other like cases were based upon the construction of the statute in question. The Court in fact came to the conclusion that, having regard to the language, scope, and object of those Acts, the Legislature intended to fix criminal responsibility upon the master for acts done by his servant in the course of his employment, although such acts were not authorized by the master, and might even have been expressly prohibited by him.

The question, then, in this case, comes to be narrowed to the

(1) L. R. 1 Q. B. 702. (2) L. R. 9 Q. B. 292.
(3) 21 Q. B. D. 249.

simple point, whether upon the true construction of the statute here in question the master was intended to be made criminally responsible for acts done by his servants in contravention of the Act, where such acts were done, as in this case, within the scope or in the course of their employment. In our judgment it was clearly the intention of the Legislature to make the master criminally liable for such acts, unless he was able to rebut the primâ facie presumption of guilt by one or other of the methods pointed out in the Act. Take the facts here, and apply the Act to them. To begin with, it cannot be doubted that the appellant sold the ham in question, although the transaction was carried out by his servants. In other words, he was the seller, although not the actual salesman. It is clear also, as already stated, that the ham was sold with a "false trade description," which was material. If so, there is evidence establishing a primâ facie case of an offence against the Act having been committed by the appellant. But it is only a primâ facie case. The burden of proof is shifted upon the appellant, and he might meet successfully that primâ facie case, if he is able, where the charge is under sub-s. 1 of s. 2, to prove that he acted without intent to defraud; or, where the charge is under sub-s. 2 of s. 2, if he is able to prove (*a*) that he had taken all reasonable precautions against committing an offence against the Act, and had no reason to suspect the genuineness of the trade description in question; *and* (*b*) that on demand he had given full information; *or* (*c*) if he is able to prove that otherwise he had acted innocently. It seems clear that clauses (*a*) and (*b*) of sub-s. 2 apply to cases where the goods in question are in the possession of the accused for sale or are sold with the forged trade-mark or false trade description already stamped upon them or otherwise applied to them, and not to a case like the present, where the false trade description is applied upon the occasion and as part of the terms of sale; and in the latter case the accused must rely for his exculpation upon clause (*c*), namely, by shewing that he had acted innocently.

In the present case there was ample evidence to justify the conclusion of the magistrates that the appellant was primâ facie guilty of the offence charged, and that primâ facie case

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has not been met in the manner required by the Act. The magistrates indeed have affirmatively found (in the terms of clause (*a*)) that the appellant had not in fact taken all reasonable precautions against committing an offence against the Act; but we have already pointed out that that clause does not directly apply to the facts of this case. This finding is therefore not strictly relevant, although it suggests an important element in determining whether the accused is innocent; but what is material to note is that the magistrates do not appear to have been asked to find, and certainly they do not in fact find, that the appellant had acted innocently within the meaning of clause (*c*). There was evidence before them that the American hams in question were dressed so as to deceive the public, and this probably explains the reason of the affirmative finding to which I have adverted, and the absence of the finding that the appellant had acted innocently within the meaning of clause (*c*).

In answer, then, to the question which alone is put to us, namely, whether upon the facts stated the decision of the magistrates convicting the appellant was in point of law correct, our answer is that in our judgment it was. When the scope and object of the Act are borne in mind, any other conclusion would to a large extent render the Act ineffective for its avowed purposes. The circumstances of the present case afford a convenient illustration of this. The appellant, under the style of the "London Supply Stores," carries on an extensive business as grocer and provision dealer, having, it appears, six shops or branch establishments, and having also a wholesale warehouse. It is obvious that, if sales with false trade descriptions could be carried out in these establishments with impunity so far as the principal is concerned, the Act would to a large extent be nugatory. We conceive the effect of the Act to be to make the master or principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants in all cases within the sections with which we are dealing where the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be

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relieved from criminal responsibility where he can prove that he had acted in good faith and had done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act. The result, therefore, is that the conviction will be affirmed, and with costs.

We wish to add that the form in which this case is stated is not satisfactory. It does not throughout clearly distinguish between what was merely evidence and what was proved to the satisfaction of the magistrates. It is important that it should be borne in mind that when a case is submitted to the Court it ought to state clearly what the facts proved were, and not merely what the evidence was.

SIR F. H. JEUNE P., CHITTY L.J., WRIGHT, DARLING, and CHANNELL JJ., concurred.

Conviction affirmed.

Solicitors for appellant: *Neve & Beck.*

Solicitors for respondent: *Weekes & Co.*

W. J. B.

BAYLIS AND ANOTHER *v.* JIGGENS AND ANOTHER.

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June 17, 27.

Landlord and Tenant—Lease—Covenant to Pay Rates, Taxes, and Assessments—Expenses of Paving Street—Summary Recovery from Owner—Claim by Owner against Tenant—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Expenses of paving, &c., a street, recovered in a summary manner, by an urban authority, from the owner of premises outside the metropolis, under the Public Health Act, 1875, s. 150, cannot be recovered by the owner from his tenant, under a covenant by the tenant to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax."

TRIAL before Channell J. without a jury.

The action was brought by the plaintiffs, the trustees of the will of W. Garrett deceased, who were the owners of certain premises situate outside the metropolis, at Southall in Middlesex, to recover from their tenants the sum of 49*l.* 17*s.* 8*d.*,

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being the amount of the expenses of paving, &c., a street, which the plaintiffs had been compelled to pay under the Public Health Act, 1875, s. 150. (1)

The plaintiffs claimed under a covenant in a lease, by which the defendants covenanted to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax." The lease was for a term of fourteen years from September 29, 1896.

The action was entered in the list of cases for trial under Order XIV.

June 17. *Galbraith*, for the plaintiffs. These expenses are a rate, tax, or assessment, and they are imposed or assessed upon the premises, or upon the landlord in respect thereof, within the meaning of the covenant, and are therefore recoverable. The cases arising under the Metropolis Management Acts, in which the landlord has failed to recover, do not affect the right of the plaintiffs in the present case, for under the Public Health Act the expenses are a charge on the premises. Moreover, the covenant in the present case contains the words "which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof." In the cases relied on for the defendants these words were absent.

R. W. Turner, for the defendants. These expenses are not a rate, tax, or assessment: *Hartley* v. *Hudson* (2), per Lindley J.; neither are they "imposed or assessed upon the premises, or the landlords in respect thereof," for to bring

(1) 38 & 39 Vict. c. 55. By s. 150 the urban authority may give notice to the owners or occupiers of premises fronting, adjoining, or abutting on a street, requiring them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting, the street; and "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises."

(2) (1879) 4 C. P. D. 367, at p. 368.

them within those words they should be apportioned according to the value of the premises, whereas the apportionment under the Public Health Act, 1875, s. 150, is to be made "according to the frontage." The words of the covenant primâ facie cover only such expenses as are of a temporary and recurring nature, and ought not to be extended so as to include a sum which is a charge upon the property giving it an increased permanent value: *Wilkinson* v. *Collyer* (1), per Manisty J. It is not to be expected that a tenant should be willing to undertake such a liability.

[In addition to the authorities which are dealt with in the judgment, the following were referred to: *Payne* v. *Burridge* (2); *Tidswell* v. *Whitworth* (3); *Thompson* v. *Lapworth* (4); *Rawlins* v. *Briggs.* (5)]

Cur. adv. vult.

June 27. The following written judgment was delivered by

CHANNELL J. This was a case argued before me a few days ago by Mr. Galbraith for the plaintiffs and by Mr. Turner for the defendants. The question is whether expenses of paving, &c., recovered in a summary manner from the owner of premises outside the metropolis, under s. 150 of the Public Health Act, 1875, can be recovered by him from his tenant under a covenant whereby the tenant covenants to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax."

The reported cases on similar covenants are very numerous; but it seemed to me on the argument, when the principal cases were quoted, that no case exactly covered the present one, and I still think so. In considering cases of this kind it is necessary, in the first place, to notice what the payment sought to be recovered is for, and next the exact words of the covenant.

(1) (1884) 13 Q. B. D. 1, at p. 5.
(2) (1844) 12 M. & W. 727.
(3) (1867) L. R. 2 C. P. 326.
(4) (1868) L. R. 3 C. P. 149.
(5) (1878) 3 C. P. D. 368.

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Expenses for abating nuisances and for drainage and other works on the premises are in some respects different from paving and works done in the street upon which the property abuts, and expenses of paving within the metropolis differ from similar expenses under the Public Health Act outside the metropolis in this respect, that under the Public Health Act such expenses are a charge upon the premises, whereas under the Metropolitan Management Acts they are not. In the present case the expenses in question were payable under the Public Health Act, and the sum is therefore both a charge on the premises, and it is also, I think, beyond doubt, a charge on the landlord in respect of the premises. Several of the reported cases which have been decided in favour of the tenants have been so decided by reason of the absence from the covenants there in question, either of words covering charges upon the premises, or of words covering charges upon landlords in respect of the premises, as, for instance, *Allum* v. *Dickinson* (1), and, perhaps, *Wilkinson* v. *Collyer* (2), where the words were absent; but it is not quite clear that this was the sole ground of the decision. Such cases are no authority in the present case, for here we have the words "imposed or assessed upon the premises or the landlords in respect thereof." In the present case, therefore, the only question is, whether the payment in question comes within the words "rates, taxes, or assessments." Now there are many of the reported cases in which these words occur, but there are generally one or more other words. Thus, in *Hartley* v. *Hudson* (3), the word "charges" occurred in the covenant. In *Budd* v. *Marshall* (4) the word "duties" occurred. In *Aldridge* v. *Ferne* (5) the word "outgoings." These cases do not, therefore, conclude the present. The nearest case to the present is, perhaps, *Wilkinson* v. *Collyer* (2), where the words were, as here, "rates, taxes, or assessments" without further addition, but, as I have already remarked, the words "imposed on the landlord in respect of the premises," which we have here, were absent. Mr. Turner relied very much on a passage

(1) (1882) 9 Q. B. D. 632.
(2) 13 Q. B. D. 1.
(3) 4 C. P. D. 367.
(4) (1880) 5 C. P. D. 481.
(5) (1886) 17 Q. B. D. 212.

in *Hartley* v. *Hudson* (1), where Lindley J. says: "The expense of paving, &c., can hardly be said to be a rate, tax, or assessment; and hence it only remains to consider whether it is a charge." But as he had got the word "charge," obviously a wider word, and one which he held covered the paving expenses, it is clear that it was not really necessary for him to consider whether the words rate, tax, or assessment, were sufficient, and that the passage is a dictum only. It seems to me necessary, therefore, for me to consider the question. I agree that these expenses cannot be considered either a rate or a tax, but I have had a good deal of doubt whether they are not "an assessment imposed on the landlord in respect of the premises." Mr. Turner contended that nothing could be an assessment which was not apportioned according to the value of the premises, and here the apportionment is according to frontage. I do not think that argument conclusive. Some sewer rates, for instance, are raised "per acre," and these would properly be described as assessments, and I think a sum to be paid out of, or in respect of, a particular property might be an assessment, if the amount were arrived at in proportion to acreage, or in proportion to frontage, just as much as if it were in proportion to rateable value. On the whole, however, having regard to the opinion of Manisty J. in *Wilkinson* v. *Collyer* (2), that primâ facie such covenants as this are confined to rates and assessments of a temporary and necessary nature, and do not include a sum which is a charge on property giving it an increased permanent value, and also to the dictum of the present Master of the Rolls in *Hartley* v. *Hudson* (1), which I have quoted, I come to the conclusion that I am justified in holding this payment not to be a rate, tax, or assessment, within the meaning of the covenant. It is obvious that, the lease being at a rack-rent, and for a short term, the tenant would not be likely to have intended to bear it, but that would be immaterial if the words were clear. I therefore give judgment for the defendants, and, of course, costs will follow.

I ought perhaps to add that the case ought not to have been

(1) 4 C. P. D. 367, at p. 368. (2) 13 Q. B. D. 1, at p. 5.

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entered in the short cause list, and I only heard the arguments because the other cases in my day's list had been disposed of.

Judgment for the defendants.

Solicitor for plaintiffs: *J. P. Garrett.*
Solicitor for defendants: *L. A. T. Margetts.*

P. B. H.

C. A.

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June 23.

[IN THE COURT OF APPEAL.]

HARROLD AND ANOTHER *v.* WATNEY.

Nuisance—Fence adjoining Highway—Defective Condition—Injury to Child using Highway—Proximate Cause of Injury—Liability of Owner of Fence.

The defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on the other side of the fence, put his foot on it, and it fell on and injured him. In an action for damages for the injuries so sustained, the jury found that the fence was very defective, but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over:—

Held, that the defective fence being a nuisance, and the cause of the injuries to the plaintiff, the defendant was liable.

APPEAL from a judgment of Ridley J. at the trial of the action with a jury.

One of the plaintiffs was an infant, who sued by his father and next friend to recover damages for personal injuries. The defendant was the owner of a piece of ground abutting on and fenced from a highway, and the statement of claim alleged a duty on his part to keep the fence in a condition so as not to be dangerous to persons lawfully using the highway; that the infant plaintiff was lawfully using the highway; and that he sustained personal injuries by the wrongful and negligent acts and defaults of the defendant in allowing the fence to be in a rotten and insecure condition so that it fell on the infant plaintiff and injured him.

The defendant pleaded that there was no wrongful act on

his part, and contributory negligence on the part of the infant plaintiff.

The evidence established that the infant plaintiff, who was four years of age, was near the fence, on the other side of which some boys were playing, that he put one foot on the fence and was about to put the other on, when the fence fell on and injured him.

The jury found that the fence was very defective, but actually fell through the infant plaintiff standing wholly or partly on the fence not for the purpose of climbing over, and, if the plaintiffs were entitled to recover, the damages were assessed at 45*l.*

The learned judge directed that judgment should be entered for the defendant.

The plaintiffs appealed.

D. Chamier, for the plaintiffs. Even if the child was climbing on to the fence, that does not deprive him of his right to recover. There are a number of cases that shew that a trespasser may have a right of action for an injury sustained while in the act of trespassing: *Ilott* v. *Wilkes* (1), as explained in *Bird* v. *Holbrook* (2); *Lynch* v. *Nurdin* (3); *Barnes* v. *Ward* (4); *Jewson* v. *Gatti.* (5)

The defendant relied on *Hughes* v. *Macfie* (6) and *Mangan* v. *Atterton* (7); but the latter of these cases is discredited in *Clark* v. *Chambers* (8), and the weight of authority is against both of them.

David, for the defendant. The case was presented to the jury on the ground of negligence and not of nuisance, and there was no evidence which should have been left to the jury. There was no inducement, and certainly not any invitation, to climb on to this fence. It is not like the case of a dwarf wall along which children would be certain to try to walk. *Hughes*

(1) (1820) 3 B. & A. 304.
(2) (1828) 4 Bing. 628.
(3) (1841) 1 Q. B. 29.
(4) (1850) 9 C. B. 392; 19 L. J. (C.P.) 195.
(5) (1886) 2 Times L. R. 381, 441.
(6) (1863) 2 H. & C. 744; 33 L. J. (Ex.) 177.
(7) (1866) L. R. 1 Ex. 239.
(8) (1878) 3 Q. B. D. 327.

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v. *Macfie* (1) is much nearer the present case than *Lynch* v. *Nurdin* (2), and the judgment of Bramwell B. in *Mangan* v. *Atterton* (3) is a distinct authority in favour of the defendant. *Jewson* v. *Gatti* (4) does not apply, because in that case there was a representation that the bar was safe and proper to lean against, while in this case no such representation can be implied.

D. Chamier, in reply.

A. L. SMITH L.J. This is an application by the infant plaintiff to have judgment entered for him in a case tried before Ridley J. and a jury. Speaking for myself, it does not seem to me that the real question on which the case ought to have been fought was specifically determined.

The facts are that the defendant was the owner of a fence by the side of a highway, and the evidence is overwhelming that the fence was rotten and defective. A boy of four years of age was using the highway, and on the other side of the fence was ground on which boys were accustomed to play. This attracted him, and he put one foot on the fence and was about to put the other on, when the fence came down upon and injured him. The question is whether this action for the injuries so sustained can be maintained. The learned judge decided that it could not, but I cannot think that is the right view. A rotten fence close to a highway is an obvious nuisance. If I were on the highway and wanted to tie up my boot, or got tired and leaned against the fence, should I not have been lawfully using the highway? The present case is a stronger one. This boy was lawfully using the highway, and doing that which is pointed out by Lord Denman in *Lynch* v. *Nurdin* (2) to be a natural thing for him to do. That case has never been overruled, but has been treated in subsequent cases as sound law. The facts were that the defendant negligently left his horse and cart unattended in the street, and that the plaintiff, a child seven years old, got upon the cart in play, and another

(1) 2 H. & C. 744; 33 L. J. (Ex.) 177.

(2) 1 Q. B. 29.

(3) L. R. 1 Ex. 239.

(4) 2 Times L. R. 381, 441.

child led the horse on, and the plaintiff was thrown down and hurt.

Lord Denman in delivering the judgment of the Court said (1): "But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally in fault. The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shewn these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it. For these reasons, we think that nothing appears in the case which can prevent the action from being maintained."

That decision carries the present case, and there is, further, the case of *Jewson* v. *Gatti* (2), which supports it. In that case there was a cellar beside the highway in which scene-painting was going on. A bar was round the opening; a passing child naturally looked down to see what was going on; the bar gave way, and he fell into the cellar. Day J. non-suited the plaintiff, but the non-suit was set aside.

Lord Esher in giving judgment said: "This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected, without any due regard to the safety of the public, and that of itself might be sufficient to sustain a case for the plaintiff. But there was more than that. For there was painting going on in the cellar, and it must have been known that this would attract children; and then a bar was put up, ostensibly for the purpose of protection, against which children would naturally lean while looking down into

(1) 1 Q. B. at p. 38. (2) 2 Times L. R. 381, 441.

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A. L. Smith L.J.

the cellar where the painting was going on. This was almost an invitation, certainly an inducement, to the children to lean against the bar while looking down into the cellar. The child leant against it and it gave way, and she fell down into the area." He then said that this was a case for the consideration of the jury, and Lindley L.J. concurred in the judgment.

I think it is the duty of this Court, seeing what are the real facts of the case and the finding of the jury that the fence was very defective, not to send the case down for a new trial, but to enter the verdict for the plaintiffs for the damages assessed by the jury. The appeal must be allowed with costs.

RIGBY L.J. I am of the same opinion. The most telling argument for the defendant was that the accident was the child's own fault, and that was the ground on which the judgment was entered for the defendant. But in neither of the cases of *Lynch* v. *Nurdin* (1) nor *Jewson* v. *Gatti* (2) was a similar argument permitted to prevail. I agree that judgment ought to be entered for the plaintiffs.

VAUGHAN WILLIAMS L.J. I agree. As the case raises a question of principle which may recur, I think it right to express my view on the matter. This is an action in which it is alleged that the injury to the child arose in consequence of the condition in which the defendant left his fence adjoining the highway. The jury were not asked specifically the question whether the fence was in such a dangerous condition as to be a nuisance to those who used the highway. But on reading the evidence the only conclusion to be arrived at is that the fence, in the condition in which it was, constituted a danger to those using the highway—that is, it constituted a nuisance. When that has been settled, all has not been done to give a right of action to the plaintiff. It must also be proved that it was this nuisance which was the cause of the injury complained of. When it is urged that the child should not have put his foot on the fence, that amounts to a suggestion that the accident was not caused by the nuisance, but by the conduct of the child;

(1) 1 Q. B. 29. (2) 2 Times L. R. 381, 441.

and for this purpose it does not matter whether that conduct was negligence or trespass. In my view, looking at the facts of this case, it is not true to say that the accident was caused by the conduct of the child. The defendant caused a nuisance, and when asking one's self if the nuisance was the cause of the accident one gets a test in this way: Ought what the child did to have been present to the mind of the person who created the nuisance as a probable result of his act? If he says that it was not the consequence of his act because the fence was good enough if grown-up people who were passing did not touch it, and that they had no right to touch it, the answer is that the highway is for children also, and if he leaves such a nuisance close to a highway it is exceedingly likely to cause injury to children using the highway. If that is so, it is the nuisance which was the cause of the injury to the child, and the defendant cannot get out of that conclusion by relying on the act of the child in touching the fence because that act was one which would probably not be done by a grown-up person. I come, therefore, to the conclusion that it has been established by the evidence that not only was the fence a nuisance, but that the injury to the child was the result of that nuisance.

Appeal allowed.

Solicitor for plaintiffs: *C. F. Appleton.*
Solicitors for defendant: *Pownall & Co.*

A. M.

C. A.
1898
May 25.

[IN THE COURT OF APPEAL.]

LOMER AND ANOTHER *v.* WATERS.

Practice—Costs—Payment into Court before Defence—Acceptance in Satisfaction—Order on Plaintiff to Pay Defendant's Costs—Jurisdiction—Order XXII., r. 7.

Where money has been paid into court before delivery of defence, and accepted by the plaintiff in satisfaction, within the time limited by Order XXII., r. 7, there is no jurisdiction to order the plaintiff to pay the costs of the defendant incurred between the dates of the payment into court and the acceptance in satisfaction.

Order XXII., r. 7, is applicable to cases in which there are no pleadings.

APPEAL from an order of Darling J.

The action was brought to recover 217*l.*, balance of an account for money paid for the defendant at his request, and commission earned by the plaintiffs as stockbrokers. The plaintiffs took out a summons under Order XIV. The defendant by affidavit raised a counter-claim for 39*l.*, being the difference between the amount claimed in the action and the amount stated to have been admitted in an account forwarded to the defendant. He also claimed 15*l.* damages for the wrongful sale of certain shares contrary to his instructions and in breach of contract.

On April 20 the master heard the summons, and directed that the action should be set down in the short cause list for the first day after May 2, 1898.

On April 26, 1898, the defendant paid into court a sum of 162*l.* as enough to satisfy the plaintiffs' claim.

On April 30 the plaintiffs' solicitor gave notice pursuant to Order XXII., r. 7, that the plaintiffs accepted the sum paid into court in satisfaction. The plaintiffs' solicitor thereupon asked the defendant's solicitors to sign a consent to withdraw the cause from the list, which they agreed to do upon an undertaking to pay the defendant's costs incurred since payment of the money into court. This undertaking the plaintiffs' solicitor refused to give, and the cause remained in the list and came on before the judge on May 4, who made the following order:

"It is ordered that the defendant do pay to the plaintiffs the costs (to be taxed) of the action herein up to the date of payment into court by the defendant of the sum of 162*l.* accepted by the plaintiffs in satisfaction of their claim, and that the plaintiffs do pay to the defendant the costs (to be taxed) incurred herein since the said payment into court."

Against this order the plaintiffs appealed.

F. Dodd, for the plaintiffs. The plaintiffs had four days under Order XXII., r. 7 (1), after receipt of notice of payment into court in which to determine whether they would accept such payment in satisfaction. The plaintiffs accepted within the time limited. As the defendant would not consent to the case being withdrawn from the list, except on terms which he had no right to impose, the case had to come on before the judge, who has not only deprived the plaintiffs of their costs subsequent to the payment into court, but has ordered them to pay costs to the defendant, which he had no jurisdiction to do.

Lord Robert Cecil, for the defendant. The order deals with payment into court "before delivery of defence," and does not apply to a case such as this, where there are no pleadings. The plaintiffs waited till April 30 before giving notice of acceptance, and, as the case was to come into the paper on May 4, the defendant was bound to be prepared. Such costs as he incurred are matters within the jurisdiction of the judge under the order, and he exercised his discretion in ordering that they should be paid by the plaintiffs.

F. Dodd, in reply.

(1) Order XXII., r. 7: "The plaintiff, when payment into court is made before delivery of defence, may within four days after the receipt of notice of such payment, or when such payment is first signified in a defence, may, before reply, accept in satisfaction of the claim or cause of action in respect of which such payment has been made the sum so paid in, in which case he shall give notice to the defendant in the form No. 4 in Appendix B, and shall be at liberty, in case the entire claim or cause of action is thereby satisfied, to tax his costs after the expiration of four days from the service of such notice, unless the Court or a judge shall otherwise order, and, in case of non-payment of the costs within forty-eight hours after such taxation, to sign judgment for his costs so taxed."

C. A. 1898

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A. L. SMITH L.J. This is an appeal from an order made in court, when the case came on for hearing in the short cause list. It seems to me that the learned judge acted under Order XXII., r. 7, but misconstrued its effect. It is suggested that the order does not apply to this case; but I am against this contention. The order was made for the purpose of enabling a defendant to pay money into court before defence, so that he need not wait for the defence before paying in money, which was all he could do under the old procedure. It is not accurate to say that the rule does not apply to this case because there are no pleadings. The rule is general, and does not depend on there being a statement of claim. If it does apply to this case, it is clear that the plaintiffs were entitled to four days in which to accept the money paid in, and to their costs up to the time when they accepted the money in satisfaction of their claim. I do not agree with the contention that the order gives a discretion to order the plaintiffs to pay costs to the defendant. The order should have been that the plaintiffs were entitled to their costs up to the time of acceptance of the money paid in. Further, there was no jurisdiction to make the last part of the order. The appeal must be allowed, and the order varied in the way I have indicated.

CHITTY L.J. I am of the same opinion. Notwithstanding the argument addressed to us, I think that Order XXII., r. 7, applies to this case. No defence was delivered, and in point of fact the payment into court was made before the delivery of defence. The learned judge seems to me to have misconstrued the rule, so that the case cannot be treated as being one of the exercise of discretion on his part as to the costs. The words of the rule do not authorize an order for the payment of costs to the other side by a plaintiff who takes out, in satisfaction of his claim, the money paid in. I agree that the plaintiffs are entitled to their costs up to the time when they accepted the money paid in, including the cost of the notice of acceptance. Beyond that I am not prepared to go, because the discretion as to costs is a matter to be exercised judicially: *Cooper* v. *Whittingham*. (1)

(1) (1880) 15 Ch. D. 501.

I cannot say that the order was so wrong that we ought to interfere with it so far as concerns the plaintiffs' costs subsequent to the time I have mentioned, though for my part I think the defendant was wrong in all the subsequent proceedings, and I should not have deprived the plaintiffs of their costs caused by the defendant forcing the case into court.

VAUGHAN WILLIAMS L.J. I am of the same opinion. As to the discretion said to have been exercised, I should agree with the defendant's counsel if that were an accurate statement of the matter before us, but I do not think it is accurate. The order lays down a general rule as to the plaintiffs' costs when money is paid into court and accepted in general satisfaction. The judge seems to have thought that the rule had no application to a case where a cause remains in the list and comes on for hearing, even though this happens by the default of the defendant, who ought to have consented to its being withdrawn. I think that it does apply, and the order should be varied so that the plaintiffs may get the costs up to the time of their acceptance of the money paid in, and should not be called on to pay any costs to the defendant.

Appeal allowed.

Solicitor for plaintiffs: *H. L. Smiles.*

Solicitors for defendant: *Sass & Young, for Young & Co., Longton.*

A. M.

C. A.
1898
June 10.

[IN THE COURT OF APPEAL.]

In re CLARK.
Ex parte SCHULZE.

Bankruptcy—Husband and Wife—Loan by Wife to Husband for Purposes unconnected with his Business—Proof against Husband's Estate—Married Women's Property Act, 1882 (45 & 46 *Vict.* c. 75), s. 3.

By s. 3 of the Married Women's Property Act, 1882, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." On a claim by a wife to prove against her husband's estate for money lent to him:—

Held, that the section does not apply to a loan by a wife to her husband for purposes unconnected with his trade or business.

In re Tidswell, Ex parte Tidswell, (1887) 56 L. J. (Q.B.) 548, approved.

APPEAL from an order of Wright J. admitting the proof of the debtor's wife for money lent.

A receiving order having been made against the debtor, who carried on business as a contractor, his wife sent in a proof for money lent by her to her husband for household expenses. The chairman at the first meeting of creditors admitted the proof for the purpose of voting, and from this decision a creditor named Schulze appealed. Wright J. affirmed the decision.

Schulze appealed.

By s. 3 of the Married Women's Property Act, 1882, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

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C. A. Russell, Q.C., and *Hansell*, for the appellant. Sect. 3 of the Married Women's Property Act, 1882, prevents the wife from proving for her debt in competition with the other creditors of her husband. The words "or otherwise" enlarge the preceding words "for the purpose of any trade or business carried on by him," and the true construction of the section is that where money is lent or entrusted by a wife to her husband for any purpose the wife cannot prove in competition with the other creditors of the husband. It is admitted that this construction would render the preceding words "for the purpose of any trade or business carried on by him" unnecessary. But this only shews that the Legislature has inserted unnecessary words, as has been done in other parts of the Act. In several sections of the Act particular words are used, followed by the words "or otherwise." For instance, in s. 1, sub-s. 1, the words are "by will or otherwise"; in sub-s. 2, "either in contract or in tort, or otherwise"; in ss. 6 and 10, "any corporation, company, or public body, municipal, commercial, or otherwise"; in s. 14, "any further or otherwise"; and in s. 17, "by summons or otherwise," and "for the purposes of costs or otherwise." In all these cases the general words make the proposition general, and render the particular words superfluous. In *In re Tidswell, Ex parte Tidswell* (1), Cave J. held that the words "or otherwise" in s. 3 did not make the section applicable to all loans by a wife to her husband, and that the section did not apply to loans for purposes unconnected with his trade or business. But that decision is not consistent with his reasoning in the earlier case of *In re Tuff, Ex parte Nottingham.* (2) In *Alexander* v. *Barnhill* (3) the Vice-Chancellor of Ireland held that the section applied to all cases where a wife lends or entrusts money to her husband. The decision in *Mackintosh* v. *Pogose* (4) does not carry the case any further, as there Stirling J. considered himself bound by the decision in *In re Tidswell, Ex parte Tidswell.* (1) The words "or otherwise" cannot refer to "carried on by him," because whether

(1) 56 L. J. (Q.B.) 548; 4 Morrell's Bank. Rep. 219.

(2) (1887) 19 Q. B. D. 88.

(3) (1888) 21 L. R. (Ir.) 511.

(4) [1895] 1 Ch. 505.

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the trade or business is carried on by him personally or by an agent, it is in law equally carried on by him. The only reasonable construction of this section is to say that it applies to all loans by a wife to her husband.

Frank Mellor (*Upjohn, Q.C.*, with him), for Mrs. Clark. The decision in *In re Tidswell, Ex parte Tidswell* (1), is good law, or, if not, it has been the law in bankruptcy so long that it ought not now to be disturbed. If the words "or otherwise" have the meaning the appellant contends for, then the prior words, "for the purpose of any trade or business carried on by him," are unnecessary and are mere surplusage. The decision of Cave J. in *In re Tidswell, Ex parte Tidswell* (1), is not inconsistent with his reasoning in *In re Tuff, Ex parte Nottingham* (2), as the latter was a very different case. There the money was lent by the wife, not to her husband, but to the firm in which he was a partner, and the proof of the wife was against the joint estate. The true construction of s. 3 is to apply the words "or otherwise" to the words immediately preceding "carried on by him," and not to annul the dominant limitation "for the purpose of any trade or business."

C. A. Russell, Q.C., replied.

A. L. SMITH L.J. In this case a proof was carried in by Mrs. Clark, the wife of the debtor, against the estate of her husband for money lent by her to him, and Wright J. has allowed the proof to stand. A creditor of the debtor appeals against the allowance of the proof, and he contends that the proof should be rejected altogether, upon the ground that by virtue of s. 3 of the Married Women's Property Act, 1882, if a wife lends money to her husband she cannot prove in respect thereof against her husband's estate until all the other creditors have been satisfied. The question therefore which we have to determine is whether that contention is correct.

It is startling to be told that the true construction of s. 3 is that in the case of a wife lending money to her husband for any purpose whatever she is in every such case to be postponed to the other creditors. Such a construction would strike out of

(1) 56 L. J. (Q.B.) 548; 4 Morrell's Bank. Rep. 219. (2) 19 Q. B. D. 88.

the section the words "for the purpose of any trade or business carried on by him." I cannot read the section in that way. Such a construction would strike out the patent limitation which appears upon the face of the section. The prohibition is not against proving for any money lent or entrusted by a wife to her husband, but against proving for any money lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise. The argument addressed to us turned upon the words "or otherwise." I agree that there is a difficulty in regard to those words. Cave J., in the case of *In re Tidswell, Ex parte Tidswell* (1), stated what he considered to be their true construction. When I am asked to say what is their true construction, I can only say that I am clear that, whatever their meaning, they do not cut out of the section the previous limitation; but I am not at all clear as to what they do mean. Cave J., in *In re Tidswell, Ex parte Tidswell* (1), said that he guessed rather than concluded that the draftsman meant to say "any money of the wife lent by her to her husband for the purpose of any trade or business carried on by him, whether alone or in partnership with others, and whether personally or by an agent." Whether that is the true construction I do not say. They may mean that; but I am quite clear, as I have said, that the true construction of those words is not to cut out the previous limitation. It is said that the judgment in *In re Tidswell, Ex parte Tidswell* (1), conflicts with the reasoning of the same learned judge in *In re Tuff, Ex parte Nottingham.* (2) I do not think that it does. In this latter case the wife sent in a proof against the joint estate of a firm, in which her husband was a partner, for money lent to the firm, whereas in *In re Tidswell, Ex parte Tidswell* (1), the proof was by the wife against her husband's estate for money lent to him for purposes unconnected with his trade or business. I do not think that his view in the one case in any way conflicts with his view in the other. But even if there is such a conflict, I agree with the judgment in *In re Tidswell, Ex parte Tidswell* (1), which was a considered judgment, later in date than the judgment in the other case, that the words "or otherwise" do not

(1) 56 L. J. (Q.B.) 548; 4 Morrell's Bank. Rep. 219. (2) 19 Q. B. D. 88.

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cut out the previous limitation "for the purpose of any trade or business carried on by him." It is then said that the Vice-Chancellor of Ireland in *Alexander* v. *Barnhill* (1) decided that the section applies to all cases where a wife lends or entrusts money to her husband. It is to be noticed that the case of *In re Tidswell, Ex parte Tidswell* (2), was not cited there; and, with great respect for that learned judge, I must say that, if he intended so to decide, I cannot agree with him.

For these reasons I am of opinion that this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. I confess that I have found myself in a difficulty in construing s. 3 of the Married Women's Property Act, 1882, because I cannot give the words an interpretation which will make them altogether rational. In fact, in the view that I take, I am bound to choose between two opposite constructions, against both of which a great deal can be said. Sect. 3 is an enactment which at the first reading would seem to relate to money lent or entrusted by a wife to her husband for the purposes of his business; and when one sees how the matter is worked out one is confirmed in that view. If a wife knowingly permits her money to be employed as capital of her husband in his business, she must be taken to be willing that it should be subjected to trade risks, and it may well be that the Legislature in such a case as that intended to say that it is not fair that the wife, having voluntarily paid money into the business, should be able to prove in competition with the other creditors. The Legislature apparently tried to apply a remedy to that state of things, and said that the money should be treated as assets of the husband until all the claims of the other creditors—not merely trade creditors, but all the creditors—of the husband had been satisfied. That may be a rough and ready mode of doing justice in such a case, but it would be a strange thing to apply such a rule to every loan by a wife to her husband, whether connected with his business or not. If the rule were so general as that, it would include the case of a loan by a wife to her

(1) 21 L. R. (Ir.) 511. (2) 56 L. J. (Q.B.) 548; 4 Morrell's Bank. Rep. 219.

husband who did not carry on any business at all. The words of the section are, "for the purpose of any trade or business carried on by him or otherwise." If the words "for the purpose of any trade or business carried on by him" were intended to be inserted merely by way of illustration, then one would have expected to have found the words running thus: "whether for the purpose of any trade or business carried on by him or otherwise." If that were so, I cannot imagine why the Legislature should have omitted the word "whether," which would have made clear their true intention. I cannot think that that is the true construction.

We have been referred to many sections of the Act in which the words "or otherwise" are used. I confess that they give me not the slightest help. Take, as an example, the words in s. 6, "any corporation, company, or public body, municipal, commercial, or otherwise." That is a form of words which is familiar to every conveyancer as used frequently in investment clauses. The words are intended to prevent any doubt which may arise, though it may be said that they add nothing to the word "corporation." I think I may say the same of every passage in which those words occur in other sections. But in s. 3 there arises this question, Otherwise than what? That is the same thing as asking, What is the antecedent? The proximate antecedent is, "carried on by him." That proximate antecedent, unless there is good reason shewn to the contrary, ought to be taken as the real antecedent of "or otherwise." I feel the same difficulty that impressed Cave J. in *In re Tidswell, Ex parte Tidswell* (1), and my brother, the Lord Justice, in the present case. I cannot tell why those words are used in that connection. Primâ facie, they can be taken to mean whether carried on by him or not—that is, for the purpose of anyone's business. That cannot be the true construction. Supposing the money was lent to the husband for the purpose of being put into a business that was not his, I do not see why in such a case it should be dealt with as assets of the husband. On the other hand, if the meaning of the words "carried on by him" is to exclude the business of

(1) 56 L. J. (Q.B.) 548; 4 Morrell's Bank. Rep. 219.

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Rigby L.J.

another person, or a business in which the husband is only a partner, the words "or otherwise" are unnecessary. Any business of his, whoever carried it on, would be "carried on by him," the agent who carried it on being his agent. It is a difficulty with which I confess I cannot grapple successfully. I prefer, however, to take that construction which appears to me the most reasonable. I do not think that this section was ever intended to deal with money lent or entrusted by a wife to her husband for a purpose other than that of his trade or business. I prefer, therefore, to say that the words "or otherwise" must somehow or other be connected with the words "carried on by him," and not with the earlier words of the section.

VAUGHAN WILLIAMS L.J. I am of the same opinion. Although I entirely agree with what has been said by my brethren as to the absurd result which would follow if we were to construe this section as we were invited to construe it by the appellant, I think that the construction which we are placing upon this section is one which we ought to place upon it quite independently of that consideration. The construction which we are to-day placing upon this section is, in my opinion, a construction which we ought to arrive at by applying the ordinary canons of construction. The rule that, where there are general words following particular and specific words all of one genus, the general words are presumed to be restricted to the same genus as the particular words, is a familiar rule of construction. In my judgment, that familiar rule is based upon a principle which applies to the section now before us. In this section there is a specific proposition followed by the general words "or otherwise." Now it seems to me that, just as where there are general words following particular words, the general words are presumed to be restricted to the same genus as the particular words; so where there is a specific proposition followed by general words, the general words ought to be presumed, unless there are some words which lead to a contrary conclusion, to be restricted to the matter that is covered by the specific proposition. The fact is that general

words in a section of this sort can hardly avoid being ancillary in their nature. When one looks at a clause like this it is quite plain that the words "or otherwise" are ancillary to the specific proposition which precedes them, and it seems to me that where there are ancillary words of that sort it is a sound and wholesome rule not to give such a construction to the ancillary words as will wipe out or do away with the specific proposition with which the clause commences. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hilberys.*

Solicitors for respondent: *Arnold & Henry White.*

A. M.

[IN THE COURT OF APPEAL.]

WOOLF *v.* HAMILTON.

Gaming—Illegal Consideration—Cheque—Bet on Horse-race—9 Anne, c. 14—*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1.

Where a cheque was given by the defendant in payment of bets upon horse-races lost by him, and indorsed by the payee to the plaintiff for value with notice of the consideration for which it was given:—

Held, that the plaintiff could not maintain an action upon the cheque, as it must be deemed by virtue of 5 & 6 Will. 4, c. 41, to have been given for an illegal consideration.

APPEAL from the judgment of Darling J. at the trial before him without a jury.

The action was upon a cheque for 84*l.* 3*s.* 9*d.*, of which the defendant was the drawer, and which had been given by him to the payee in payment of bets lost on horse-races. The cheque had been indorsed by the payee to the plaintiff for value, the plaintiff knowing for what consideration the cheque had been given when it was so indorsed to him.

The learned judge held that, by virtue of the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), the cheque must be deemed to have been given for an illegal consideration, and therefore the action was not maintainable. He therefore gave judgment for the defendant.

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Ritter, and *F. W. Sherwood*, for the plaintiff. Horse-racing is not per se illegal, and a bet on a horse-race is not an illegal contract, but merely void under the statute 8 & 9 Vict. c. 109: *Applegarth* v. *Colley* (1); *Read* v. *Anderson*. (2) Therefore the plaintiff, having given value for the cheque, can recover upon it, although he had notice for what consideration it was given. It is true that there have been decisions to the effect that horse-racing is a game coming within the statute, 9 Anne, c. 14: see *Goodburn* v. *Marley* (3); *Lynall* v. *Longbothom* (4); *Blaxton* v. *Pye* (5); and, if so, it would follow that notes, bills, or mortgages given in payment of bets won on horse-races would be within the later statute, 5 & 6 Will. 4, c. 41, which enacts that such notes, bills, or mortgages as would have been void under the statute of Anne are to be deemed to have been given for an illegal consideration. Those decisions, however, are not binding on the Court of Appeal, and it is submitted that they were wrong. Horse-racing is not expressly mentioned in the statute of Anne, and is not ejusdem generis with the games therein mentioned.

[They cited *Lilley* v. *Rankin*. (6)]

F. Shewell Cooper, for the defendant, was not called upon. (7)

A. L. SMITH L.J. This is an appeal from the judgment of Darling J. in favour of the defendant in an action brought by the plaintiff upon a cheque of which he was indorsee. The cheque was indorsed to the plaintiff for value with notice that it had been given in respect of bets won upon horse-races. The question is whether the plaintiff can under these circumstances maintain an action upon the cheque so given. It has been held that horse-racing came within the provisions of 9 Anne, c. 14. It was expressly mentioned in the statute 16 Charles 2, c. 7, and the authorities shew that the same kind of games were covered by the statute of Anne as by the

(1) (1842) 10 M. & W. 723.
(2) (1882) 10 Q. B. D. 100; (1884) 13 Q. B. D. 779.
(3) (Michas. 15 Geo. 2) 2 Str. 1159.
(4) (1756) 2 Wils. 36.
(5) (1766) 2 Wils. 309.
(6) (1886) 56 L. J. (Q.B.) 248.
(7) By 8 & 9 Vict. c. 109, s. 15, the statute 16 Chas. 2, c. 7, and so much of 9 Anne, c. 14, as was not altered by 5 & 6 Will. 4, c. 41, were repealed.

statute of Charles II. We clearly should not be justified in overruling the authorities to that effect, seeing that the Legislature has on many occasions since legislated upon these matters, and has not touched those decisions. If horse-racing was within the statute of Anne, the case is clear. By the statute 5 & 6 Will. 4, c. 41, s. 1, so much of the statutes of Anne and Charles II. as made notes, bills, or mortgages given as therein mentioned absolutely void is repealed, and it is enacted that every note, bill, or mortgage which would have been by virtue of those acts absolutely void shall, instead of being absolutely void, be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. The result of that enactment clearly is that a person who takes such a security for value, knowing for what consideration it was given, takes it with notice that it was given for an illegal consideration, and therefore cannot recover upon it. Consequently the judgment of the learned judge was right, and the appeal must be dismissed.

RIGBY L.J. I am of the same opinion.

VAUGHAN WILLIAMS L.J. I agree. There is a short passage in the judgment in *Hay* v. *Ayling* (1) to which I would refer. In that case bills were given for bets won on a horse-race and the plaintiff knew that to be so. Lord Campbell C.J. said in giving judgment: "As the law now stands, the illegality of the gaming consideration would be immaterial to a bonâ fide holder without notice of the consideration, but the plea goes on to allege (what was distinctly proved) that the plaintiff, before and at the several times when the bills were made and accepted, had notice of the premises aforesaid, and took the said bills from the defendant with the said notice"; and further on he says: "An exception was taken to the validity of the plea on the ground that statute 8 & 9 Vict. c. 109, s. 18, does not expressly avoid securities given for a gaming debt; but statute 5 & 6 Will. 4, c. 41, s. 1, does enact that such securities shall be deemed to have been made for an illegal consideration;

(1) (1851) 16 Q. B. 423.

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and they are therefore void except in the hands of a bonâ fide holder without notice."

Appeal dismissed.

Solicitors for plaintiff: *H. Dade & Co.*
Solicitor for defendant: *W. H. Curtis.*

E. L.

1898 *May 2.*

THE QUEEN *v.* BIRD AND OTHERS. *Ex parte* NEEDES.

Licensing Acts—Licence—New Licence—Confirmation of Provisional Licence—Rule of Practice imposing Condition on Right to Oppose—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *ss.* 37, 43.

By s. 37 of the Licensing Act, 1872, a grant of a new licence in counties by licensing justices is not valid unless confirmed by the county licensing committee. By s. 43, any person who opposes before licensing justices the grant of a new licence, and no other person, may oppose the confirmation of the grant by the confirming authority; by the same section power is given in counties to the justices in quarter sessions to make rules as to the proceedings to be adopted for confirmation of new licences.

A court of quarter sessions, acting under s. 43, made a rule that every person intending to oppose the confirmation of any provisional licence before the county licensing committee must, within seven days after the grant of the provisional licence, give notice to the applicant and to the clerk of the peace of his intention to oppose the confirmation:—

Held, that the rule was ultra vires, as imposing a condition upon the statutory right to oppose the confirmation of the licence not imposed or authorized by the statute.

RULE NISI for a mandamus to the confirming committee of justices for the county of London commanding them to hold an adjourned sessions and hear and determine the application of V. Guidotti, pursuant to s. 43 of the Licensing Act, 1872, that a provisional grant of a victualler's licence for certain premises might be confirmed, and to hear the objection of the prosecutor thereto.

By s. 37 of the Licensing Act, 1872, it is provided (inter alia) that in counties a grant of a new licence shall not be valid unless it is confirmed by a standing committee of the county justices, in the Act called a county licensing committee, and that the justices in quarter sessions shall make such regulations

with respect to the meetings of any such committee and the transaction of business thereat as they may think fit. By s. 43, "Any person who appears before the licensing justices and opposes the grant of a new licence, and no other person, may appear and oppose the confirmation of such grant by the confirming authority in counties or boroughs; and the confirming authority may award such costs as they shall deem just to the party who shall succeed in the proceedings before them. In a county the justices in quarter sessions assembled, and in a borough the borough justices, shall make rules as to the proceedings to be adopted for confirmation of new licences and the costs to be incurred in any such proceedings, and the person by whom such costs are to be paid."

The following rules or standing orders were made by the justices in quarter sessions for the county of London :—

Rule 30: "Every person (subject as hereinafter provided) intending to oppose the confirmation of any such provisional licence or certificate before the county licensing committee shall, within seven days after the grant of such provisional licence or certificate, give notice to the applicant, and also to the clerk of the peace, by registered letter, of his intention to oppose the confirmation of such provisional licence or certificate. Every such notice of intention to oppose shall contain the name and address of the person giving the notice."

Rule 31: "Every person giving the requisite notice of opposition shall, by himself and one surety, within three days after the notice shall have been given, enter into recognizances in the sum of 20*l.* each before a justice of the peace of the county of London, conditioned for the payment of all costs ordered by the county licensing committee to be paid by such person."

Rule 34: "Each applicant must, unless he shall shew lawful excuse for his absence, attend the meeting of the committee in person; and any person who has appeared before the licensing justices and opposed a grant of a new licence or certificate, and who has complied with these regulations, and no other person, may appear before the county licensing committee, and may

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oppose the confirmation of such grant, and the county licensing committee may, in their discretion, award such costs as they may deem just to any, or either, of the parties to the proceedings before them."

From the affidavits used upon the present application it appeared that on March 25, 1898, an application was made by Guidotti to the licensing justices for the St. Margaret's division of Westminster for a new licence; the grant was opposed by one Needes (on whose behalf the present rule was obtained), but a provisional licence was granted by the licensing justices. No notice under rule 30 was given within seven days by Needes of his intention to oppose the confirmation of this provisional licence, but on April 16 a notice of intention to oppose was on his behalf tendered to the clerk of the peace; it was, however, refused on the ground that it had not been given within the time prescribed by the rule, and that the application had therefore been transferred to the unopposed list. On the next day, April 17, notice of intention to oppose, and of an application for leave to be heard in opposition to the confirmation of the licence, was served on Guidotti in a registered letter. At the meeting of the county licensing committee on April 27, Needes appeared to oppose, and applied for leave to oppose the confirmation of the licence; leave was, however, refused, and the provisional licence was confirmed. The present rule was then obtained on behalf of Needes.

Scrutton, for the respondent Guidotti, shewed cause. The county licensing committee were right in declining to hear the objector on the ground that he had not complied with the requirements of rule 30 of the standing orders. The quarter sessions had jurisdiction to make the rule; s. 37 of the Licensing Act, 1872, gives them power to make rules for the regulation of committee meetings and for the transaction of business there, while s. 43 gives them a still wider power, and enables them to make rules as to the proceedings to be adopted for the confirmation of new licences. The rule is within the power given by s. 43, which goes beyond the inherent power of quarter sessions to regulate its own practice.

It is also reasonable; were it not for some such provision the applicant would always have to be prepared with all his witnesses before the county licensing committee on the assumption that the opposition would be renewed.

Candy, Q.C. (*Peter Grain* with him), in support of the rule. Rule 30 is ultra vires and bad. It is plain from the language of the statute that the intention of the Legislature was that there should be only one condition precedent to the locus standi of the objector before the confirming authority, namely, his appearance to oppose the provisional grant of the new licence by the licensing justices; if he has so appeared to oppose in the first instance, he has a statutory right to appear before the county licensing committee and oppose the confirmation of the licence. Rule 30 is a rule of practice only, and any rule of practice which imposes an additional condition not imposed by the statute under which the rule is made, and which by its narrowness excludes a person whom the Legislature meant to include, is ultra vires: *Reg.* v. *Pawlett.* (1) It is unreasonable to require an objector who has already opposed before the licensing justices to give a fresh notice of opposition to the applicant, who must necessarily go before the confirming committee, and who cannot possibly be taken by surprise by the renewal before that tribunal of the opposition already made before the licensing justices. [He also cited *Rex* v. *Lambeth* (2); *Rex* v. *Norfolk Justices* (3); *Rex* v. *Staffordshire Justices* (4); *Reg.* v. *Montgomeryshire Justices* (5); *Reg.* v. *Surrey Justices.* (6)]

WILLS J. I have come to the conclusion that the rule in question was ultra vires, and that the rule nisi obtained by the objector should be made absolute. Primâ facie indeed nothing would seem to be more reasonable than a rule of practice by which such a condition of a renewed opposition might be enforced, and if the question were simply whether this rule was in itself reasonable I should not entertain a doubt

(1) (1873) L. R. 8 Q. B. 491.
(2) (1823) 3 D. & R. 340.
(3) (1834) 5 B. & Ad. 990.
(4) (1836) 4 A. & E. 842.
(5) (1845) 3 D. & L. 119.
(6) (1849) 6 D. & L. 735.

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that it was both reasonable and proper. But the question is whether it is within the power to make rules conferred on the county justices by the statute. The language of s. 43 is in my opinion itself somewhat ambiguous when it gives power to the justices to make rules "as to the proceedings to be adopted for confirmation of new licences"; but I think that that must include the power to make rules (always supposing them to be consistent with the Act of Parliament) dealing with the opposition as well as with the actual confirmation of the licence, for the opposition is in effect part of the proceedings for confirmation. The section must contemplate the making of rules necessary for regulating the proceedings when the confirming sessions are held, whether such rules relate to the position of the applicant or of his opponent. But that leaves the real difficulty of the case still untouched. Parliament has in so many words given to a person desirous of opposing the grant of a new licence power to appear and to be heard before the county licensing committee in opposition to the confirmation of the grant. I think the sounder view is that the right of the justices to make rules, however wide may be the area that they cover, cannot affect the privilege of the objector to be heard in opposition to the confirmation, and that these particular rules really do impose fresh conditions upon the exercise of the objector's right. The statute says that any person who has opposed the application for the licence in the first instance, and no other person, may appear before the confirming committee and oppose its confirmation. Rule 34 expresses very neatly what is to be done; it provides in effect that a person who has complied with the provisions of the statute and has satisfied the regulations of the county justices, and no other person, may appear before the committee and oppose the confirmation of the licence. The rule imposes as a necessary preliminary to the right to oppose the confirmation something which is not to be found in the statute; it is therefore in my opinion ultra vires. I think that the justices in quarter sessions may effect the same desirable object by a rule properly framed that they have sought to effect by rule 30. It is clearly within their power to say that if adequate notice of

opposition to the confirmation of the licence has not been given the costs of any adjournment thereby rendered necessary, or any other costs thrown away, must be paid by the objector; nothing could be more reasonable, and it would undoubtedly be within the powers of quarter sessions for regulating their own procedure. Any such rule would have my entire judicial sympathy; but there can be no question that the rule as drawn goes beyond the statutory power to make rules, and imposes a condition not warranted by the statute. There has been no argument upon rule 31, which imposes as a condition the finding of a surety for the payments of costs; it is, however, almost too clear for argument that there is no power to impose such a condition; this group of rules indeed clearly requires revision. The mandamus must therefore go.

I only desire to add one other remark: the cases cited in argument may be wholly disregarded; they have really nothing to do with the present case. I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself. In the present case there is no difficulty in ascertaining the principle which should be applied; the difficulty is to find what is comprised in the somewhat ambiguous language used by the Legislature.

KENNEDY J. I am of the same opinion. The justices who had to deal with the confirmation of this licence refused to hear the objector; they treated themselves as bound strictly by certain rules of procedure with which the objector had not complied. But what was the real position of affairs? The objector had satisfied the only express requirement of s. 43 of the Licensing Act, 1872; he had appeared before the justices and opposed the grant of the licence in the first instance, and he was therefore under the express provision of the section a person who had entitled himself to appear and oppose the confirmation of the licence. What he did not do was this: he

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did not give within seven days of the grant of the provisional licence the notice of his intention to oppose the confirmation required by rule 30; he had indeed sent such a notice ten days before the sittings of the confirming authority, but not within seven days of the grant of the provisional licence. He seems to have omitted these notices at the time because he was unaware of the rule; he did, however, subsequently send a notice of opposition in a registered letter; but the justices declined to recognise this as sufficient, and absolutely refused him a hearing.

The only question for us is whether these rules are good under the last part of s. 43. I do not think that any of the cases cited materially assist us, and I therefore refrain from mentioning them. I desire to deal only with the general question whether these rules are ultra vires as being in excess of the powers granted to quarter sessions by statutory enactment. Now, to make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements is, in my opinion, clearly ultra vires. If rules 30 and 34 had said in substance that unless the notices required by rule 30 were given the case would be entered in the unopposed list subject to transfer to the opposed list for good cause shewn, it would have been a very different question; perhaps, too, the question of costs in such a case might have been dealt with. But that is not like the present case, where an absolute bar has been imposed upon the exercise of a statutory right in the form of a requirement, non-compliance with which will wholly prevent the objector from being heard. These rules not only require a notice of intention to oppose to be given within seven days, but also require the name and address of the objector to appear in the notice—a requirement which certainly cannot be imposed as a condition precedent to the exercise of a right to perform a public duty in the public interest. It is obviously convenient that notice of opposition should be given, and an unobjectionable rule might easily be framed. But to refuse a hearing even to shew cause why the notice was given a day too late, or the address omitted, is adding something to the statute which has

laid down only one absolute condition to the exercise of the statutory right.

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Rule absolute for a mandamus.

Solicitor for prosecutor: *Percy Gates.*
Solicitor for respondent: *F. A. Rudall.*

W. J. B.

SMITH *v.* SHANN AND OTHERS.

1898
May 23.

Licensing Acts—Licence—Renewal—Objection on same Grounds as previous Objection to Transfer—Estoppel—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.

Where, upon an application for the transfer of a licence to sell beer by retail on or off premises licensed prior to May 1, 1869, an objection is made upon one of the four grounds enumerated in s. 8 of the Wine and Beerhouse Act, 1869, but the justices in the exercise of their discretion grant the transfer, the same objection upon the same facts may be taken at the next general annual licensing meeting to the renewal of the licence, and the renewal may be refused on that ground.

CASE stated by the court of quarter sessions for the Salford Division of the county of Lancaster upon appeal against the refusal of licensing justices for the county and city of Manchester to grant to the appellant a renewal of a licence to sell by retail beer to be consumed on and off the premises in a house known as the Teignmouth Inn, in the city of Manchester. The following were the material facts.

On July 29, 1897, the appellant applied at a transfer sessions for the city of Manchester for the transfer to him of the licence then in existence, and held by one Ellen Core, for the Teignmouth Inn. The house had been continuously licensed for the sale of beer by retail to be consumed on or off the premises since prior to 1869. The application was opposed by the police on the ground that the house was of a disorderly character; no objection was taken upon any other of the grounds upon which a transfer could be refused. Evidence was called as to the disorderly character of the house, and a conviction dated March 24, 1897, for permitting the house to be used for the purpose of betting, was proved. The justices, after consideration of the

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facts placed before them, granted the transfer of the licence to the appellant.

On September 10, 1897, at the adjourned annual Brewster Sessions for the city of Manchester, the appellant applied for a renewal to him of the licence of the Teignmouth Inn. The renewal was opposed by the police, the only objection being on the ground that the house was of a disorderly character, and was used for the purpose of betting, and substantially upon the same facts as were proved before the transfer sessions, but with additional evidence. No evidence was given of any act done by the appellant since the date he obtained the transfer or of any other matter. The application for a renewal was refused by the justices upon the ground that the house was of a disorderly character.

It was contended on behalf of the appellant that, the same matter having been once determined, the justices had no right to reopen it a second time to vex the appellant twice for one and the same case, and that the matter was res judicata.

It was contended on behalf of the respondents that the justices at the annual licensing sessions had jurisdiction to hear and determine the objection to the renewal of the licence on its merits, and that they were not precluded or prevented from so doing by the transfer of the licence.

The court of quarter sessions heard the evidence, and found as a fact that the house was of a disorderly character, and affirmed the decision of the justices subject to this case.

The questions for the court were—(1.) whether the matter was res judicata, or (2.) whether the justices sitting at the annual licensing sessions had power to reopen the same facts. (1)

(1) By s. 19 of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27), Where, on the 1st of May, 1869, a licence under any of the recited Acts is in force "with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine to be consumed on the premises in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused, in accordance with this Act. . . . ."

By s. 8, ". . . . No application for

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C. A. Russell, Q.C. (*E. W. Jordan* with him), for the appellant. The justices at the Brewster Sessions were estopped from refusing a renewal of the licence on the ground of the disorderly character of the house; that question had already been decided by the justices who granted the transfer; there was then a determination once for all of the subject-matter of the objection. Although, upon an application for a renewal, justices may go into a charge arising before the transfer of the licence to the applicant, as was held in *Reg.* v. *Miskin Higher Justices* (1), they cannot reopen a charge which has already been disposed of at the transfer sessions; to hold otherwise would be to place the transferee in a position of insecurity that could not have been contemplated by the Legislature.

Danckwerts, for the respondents. The case is governed by s. 19 of the Wine and Beerhouse Act, 1869, this being an on, as well as an off, licence; that section does not expressly apply to transfers, but it was held so to apply in *Simonds* v. *Blackheath Justices*. (2) The effect of that section, which incorporates the four grounds of refusal specified in s. 8, is to give a discretion to licensing justices either to allow or to refuse an application, subject to the limitation that a refusal can only be on one of four grounds; and all that the justices in transfer sessions did in the present case was to exercise their discretion by declining to act on any of these statutory grounds; this does not

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a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the following grounds, viz.:—

"(1.) That the applicant has failed to produce satisfactory evidence of good character:

"(2.) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:

"(3.) That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles:

"(4.) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required."

(1) [1893] 1 Q. B. 275.

(2) (1886) 17 Q. B. D. 765.

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amount to an estoppel, for it was not a decision on the merits of the objection. Very different considerations apply to transfers and renewals, and justices might think it desirable to grant a transfer of an existing licence, leaving the determination of the objection until the application for a renewal. In the present case it is plain that the justices in transfer sessions could not have judicially decided in the appellant's favour on the objection, for a house where betting is permitted is by statute declared to be a disorderly house; they must, therefore, have granted the transfer in spite of the objection, and their decision was a mere exercise of discretion.

[He was stopped by the Court.]

WILLS J. I am of opinion that our judgment should be for the respondents. From the moment when the question between the parties was stated I had the clearest possible view on the matter. What was done by the justices when the transfer was applied for was in no sense a decision, or a judgment of a Court, upon which an estoppel could be founded; to hold otherwise would involve an enormous extension of the doctrine of estoppel. The statute says that the justices shall not exercise their discretion adversely to the applicant except upon one of four grounds; it does not say that they are to refuse the application, if one of the grounds of objection is made out; to have said so would have been to take away their discretion altogether. I can entertain no doubt that in the present case the justices were acting wholly within their rights.

KENNEDY J. I am entirely of the same opinion.

Judgment for the respondents.

Solicitors for appellant: *Crowders & Vizard, for Hockin, Raby & Beckton, Manchester.*

Solicitors for respondents: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1898
June 8.

HOME MARINE INSURANCE COMPANY, LIMITED *v.* SMITH.

Insurance, Marine—Policy—Reinsurance—"Open Cover"—Sum Insured not Specified—Contract for Sea Insurance—Validity—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 93, 95.

By a document called an "open cover" the defendant, with other underwriters, agreed to reinsure the plaintiffs to the extent of the excess, over certain amounts mentioned in the document, upon risks undertaken by them from time to time, on goods shipped by certain steamship lines therein mentioned. The limit of the excess on any one ship and the proportion of this amount taken by each underwriter were specified. Goods which were insured by the plaintiffs, on a steamship of one of the lines, were lost by a peril insured against, and the plaintiffs paid the insurance and sued the defendant for his proportion of the excess:—

Held, that the document was a "contract for sea insurance" within s. 93, sub-s. 1, of the Stamp Act, 1891, which by that sub-section was not valid unless expressed in a policy of sea insurance, and that, as it did not specify "the sum or sums insured" as required by sub-s. 3, it was invalid as a policy of sea insurance, and could not be stamped and sued on as such, nor could it be sued on as a contract to issue a policy.

Judgment of Mathew J., reported [1898] 1 Q. B. 829, affirmed.

APPEAL from the judgment of Mathew J., sitting as the judge taking commercial causes, in favour of the defendant upon the trial of a preliminary question in the action, reported [1898] 1 Q. B. 829.

The points of claim were as follows:—

1. By a contract of reinsurance the defendant, with other underwriters, agreed to reinsure the plaintiffs to the extent of the excesses over certain amounts, limited as therein agreed, upon risks which the plaintiffs had then taken, or might thereafter take, on goods by certain steamship lines therein mentioned. The amount of the reinsurance was 4000*l.*, and the part thereof taken by the defendant was 400*l.*

2. In the month of June, 1896, goods per the *Golden Fleece*, a steamer belonging to one of the agreed lines, were totally lost by perils by the said contract insured against. The plaintiffs were original insurers of the goods, and as such were liable

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to pay, and have paid, for total loss and charges in respect thereof, 5008*l.* 4*s.* 5*d.* The reinsured excess over the plaintiffs' reserved limit of 1500*l.* was 3508*l.* 4*s.* 5*d.*, and the defendant's proportion thereof is 350*l.* 16*s.* 5*d.*, which the defendant has not paid.

3. Alternatively the plaintiffs say that they are, under the same contract, entitled to have issued to them by the defendant a duly subscribed policy in respect of the said goods, and to have paid to them thereunder the aforesaid loss.

Points of defence were delivered, of which the following is here material:—

3. There was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the statute 54 & 55 Vict. c. 39, s. 93. (1)

The document which was relied on by the plaintiffs as a contract of reinsurance was, so far as here material, in the following words and figures: "Open Cover, 30/6/96. Dawson Brothers" (the plaintiffs' brokers). "Cash. Steamer or Steamers, U. K. or Continent $\frac{\text{and}}{\text{or}}$ America. West Indies. Merchandise. R. I." (reinsurance). "Rates as per indorsement. F. G. A. and Y. A. Rules. Deviation Clause. Old or new B. L. including all risks from warehouse, lighterage, and until delivered to destination. Negligence Clause. 4000*l.*" (this was explained to be the limit of the excess taken on any one ship). Upon the face of the document there was a statement of the proportion of this sum of 4000*l.* taken by each underwriter, initialled by each, the total of the amounts so initialled making up the above-mentioned sum of 4000*l.* The

(1) 54 & 55 Vict. c. 39. By s. 93, "(1.) A contract for sea insurance" (with an exception not here material) "shall not be valid unless the same is expressed in a policy of sea insurance . . . ."

"(3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

Sect. 95 prohibits, with certain exceptions, the stamping of policies of sea insurance after execution,

"(2.) Provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l.*"

amount initialled by the defendant was 400*l*. Indorsed was a list of steamship lines on which excesses on goods were insured, including the Kerr Line, with statements of the rate of premium; and opposite the name of each line was placed a statement of the amount which the plaintiffs were to reserve for themselves upon any one ship of that line before declaring the excess.

This document did not specify the names of the underwriters, except by initials as above stated, and it was not stamped.

For the purposes of the cause the defendant admitted—

"1. That on or about June 9, 1896, the *Golden Fleece*, a steamer of the Kerr Line, was totally lost by perils of the sea, at or near Morant Point lighthouse off the south-east point of the island of Jamaica.

"2. That part of the cargo of the *Golden Fleece* was totally lost with her."

An order was made at chambers that the question raised under paragraph 3 of the defence be tried, and that, for the purposes of the trial of that question, the Court was to assume that all penalties (if any be necessary) had been paid.

Mathew J. gave judgment for the defendant. (1)

Carver, *Q.C.*, and *J. A. Hamilton*, for the plaintiffs. The first point for which the plaintiffs contend is that the document in question is a policy of sea insurance, which is valid within s. 93, sub-ss. 1, 3, of the Stamp Act, 1891, and therefore by s. 95, sub-s. 2, it can be stamped after execution on payment of the prescribed penalty. The judgment of the learned judge below appears to proceed on the view that a "slip" cannot be a policy. It ignores s. 91 of the Act by which "policy of insurance" is made to include every writing whereby any contract of insurance is made or agreed to be made. By virtue of that section "policy of sea insurance" merely means any written contract of sea insurance. The document here in question is a contract in writing, not for reinsuring any existing risks, but that the underwriters will undertake for twelve months to reinsure up to certain amounts any risks in excess

(1) [1898] 1 Q. B. 829.

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of certain amounts which the plaintiffs may during that period undertake upon merchandise shipped on steamers of certain lines. Assuming for the purposes of the present contention that a contract for insurance of this kind, made by way of anticipation, is a contract for sea insurance within the provisions of the Act with regard to policies of sea insurance, the contract is expressed in a "policy of sea insurance" within the meaning of s. 93, sub-s. 1 as interpreted by s. 91, and that policy complies with the requirements of s. 93, sub-s. 3. The contract is in writing. It specifies the particular risks or adventures in respect of which the insurance is to be, so far as they are capable of being specified by anticipation. The names of the underwriters are specified by their initials, and the sums insured are specified so far as is possible by the sums initialled by the different underwriters. It is impossible to state the actual sums which will be insured, because they will depend upon the excess risks which the plaintiffs may undertake. *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1) shews that this document sufficiently specifies the risk or adventure.

[They also referred to *Crowley* v. *Cohen* (2) and *Thompson* v. *Adams*. (3)]

Alternatively, if this document does not satisfy the requirements of s. 93, sub-s. 3, it is contended that such a contract as this is not a contract for sea insurance within the provisions of the Act with regard to policies of sea insurance at all. It is impossible to specify the matters mentioned in s. 93 more definitely, the contract not being a contract to reinsure existing risks, but to reinsure risks of a certain description that the plaintiffs may during a certain period undertake. It is a reasonable construction of the Act that its provisions with regard to policies of sea insurance only apply when the contract of insurance is of such a nature that the requirements of s. 93, sub-s. 3, can be satisfied—that is to say, when there is an actual insurance of an existing risk or adventure, not where the contract is to enter into a contract of insurance in future. If this view is correct, then the document is not a "contract

(1) (1876) 1 Q. B. D. 563. (2) (1832) 3 B. & Ad. 478.
(3) (1889) 23 Q. B. D. 361.

for sea insurance," but merely a contract to issue in certain events a duly subscribed policy, and would be subject to the provisions of the Act as to stamp duty applicable to an ordinary written agreement. It is a contract relating to the business of sea insurance, and it gives a right to have a policy issued, of which specific performance will be granted: *Bhugwandass* v. *Netherlands India Sea and Fire Insurance Company of Batavia.* (1)

If neither of the above two contentions is correct, then the only remaining alternative is that the intention of the Act was to render illegal and void such a contract as is contained in this document, and to impose a penalty under s. 97 on any person who makes himself a party to the document. It is impossible to suppose that the Legislature intended to forbid this class of contract, which is very common in business and which is perfectly definite and reasonable.

Joseph Walton, Q.C., and *Scrutton*, for the defendant. This document, which is called an open cover, amounts to a contract for sea insurance. A reinsurance is a form of insurance whereby the original underwriter stipulates to be indemnified against certain risks which he has undertaken: Phillips on Insurance, s. 377. This open cover is a contract for reinsurance on goods. It is an insurance on excesses, but that only defines the insurable interest and limits it. The provisions of s. 93 are therefore applicable, and by sub-s. 1 the contract must be expressed in a policy of sea insurance, and by sub-s. 3 the policy must contain certain particulars. The sum or sums insured must be specified. That is not done here, as there is no limit of amount by means of which the stamp can be fixed. Nor are the names of the subscribers or underwriters specified, the initials of the underwriters not being sufficient. The judgment of the Court of Queen's Bench delivered by Blackburn J. in *Ionides* v. *Pacific Insurance Co.* (2) applies to this case, for there that learned judge, in speaking of 30 & 31 Vict. c. 23, ss. 7 and 9 (3), which, so far as material, are similar to the provisions of s. 93 of the Stamp Act, 1891, said (4) that "as the slip is clearly a contract

(1) (1888) 14 App. Cas. 83.

(2) (1871) L. R. 6 Q. B. 674; affirmed (1872) L. R. 7 Q. B. 517.

(3) Repealed by s. 123 of the Stamp Act, 1891.

(4) L. R. 6 Q. B. at p. 685.

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for marine insurance, and is equally clearly not a policy, it is by virtue of these enactments not valid, that is, not enforceable at law or in equity." This action, therefore, is not maintainable.

Carver, Q.C., replied.

A. L. SMITH L.J. In my opinion this appeal fails, and I base my decision upon one point only. The question is whether this action can be maintained upon this open cover or slip. Now, the intention of the parties as conveyed by this document was to cover marine risks. It is a contract of reinsurance in respect of excesses, over certain amounts, upon risks which the plaintiffs had undertaken or might undertake on goods by certain ships. It is therefore a contract for sea insurance.

Then comes the question whether this document satisfies the requirements of s. 93 of the Stamp Act, 1891. I say nothing about other slips, because they are not before us, nor do I say anything with reference to the question whether a slip can ever be sued on. I confine my judgment to the question whether this particular document, which as I have said is a contract for sea insurance, sins against the requirements of s. 93, sub-ss. 1, 3, of the Stamp Act, 1891, which enact that a contract for sea insurance shall not be valid unless it is expressed in a policy of sea insurance, which must specify, among other things, the sum or sums insured. It seems to me that the sum insured is not specified in this document. No one can tell what amount may be declared upon this document. The only limit to be found within its four corners is that the underwriters are not to be called upon to pay more than 4000*l.* as regards any one ship. It is perfectly impossible upon the face of this document to say that it specifies the sum or sums insured; and therefore this contract for sea insurance is not expressed in a policy, if it be a policy at all, which satisfies the requirements of s. 93, sub-s. 3, of the Act of 1891, and is invalid. For these reasons I think that the plaintiffs cannot sue upon this document, and this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. A great many points have been discussed during the argument, but I think it is

desirable to deal only with one point, which is decisive of this case. We have here an open cover in form resembling in some respects an ordinary slip. The first question is whether it is a contract for sea insurance within the provisions of the Stamp Act, 1891. Sect. 91 of that Act deals with policies of insurance generally; ss. 92–97 deal with policies of sea insurance; and ss. 98–100 deal with policies of insurance except policies of sea insurance. So that in those sections all policies whatsoever seem to me to be dealt with. That this document falls within the sections dealing with policies of sea insurance, namely, ss. 92–97, I do not think can be a matter of doubt. It is a contract for sea insurance in a particular form—that is to say, it purports to be a reinsurance of the original underwriters in respect of part of the interest which they acquire by undertaking the liability. It is a contract of insurance on excesses, and the risks insured against are marine risks. It is therefore a contract for sea insurance within the provisions of this Act.

The next question is whether this is a valid contract. To make it valid within s. 93 it must be expressed in a policy of sea insurance, and the policy must specify the sum or sums insured. In this document the amount of the insurance is in no way dealt with, except by stating that the insurance shall not exceed 4000*l.* on any one ship. The insurance might be expected to cover, and probably has covered, something much larger than the 4000*l.* mentioned in the document, and I do not know what stamp should be put upon it. If it complied with s. 93 it might perhaps—I express no opinion upon it—be treated as a policy; but inasmuch as there is the vital defect in it that it does not specify the sum insured, it must be treated as null and void, and cannot be stamped and sued on.

VAUGHAN WILLIAMS L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors for plaintiffs: *Tippetts & Son.*
Solicitor for defendant: *James Ballantyne.*

A. M.

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May 10, 24.

HORN, APPELLANT *v.* RURAL DISTRICT COUNCIL OF SLEAFORD AND OTHERS, RESPONDENTS.

Local Government—Water Supply—Contributory Place—"Special Expenses"—Water Rates and Rents—Liability of Contributory Place for Expense of Water Supply to Part of such Place—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 229, 230—*Public Health* (*Water*) *Act*, 1878 (41 & 42 *Vict. c.* 25), *s.* 10.

Where a rural sanitary authority has, under the provisions of the Public Health Act, 1875, supplied water to part of a contributory place, the expenses both of supply and of maintenance must, so far as they cannot be defrayed by a reasonable water rate or water rent to be paid by the consumers, be raised as special expenses by a rate on the whole contributory place.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

"The appellant is the occupier of certain hereditaments comprising a house, farm buildings, and farm in the parish of Heckington, in the parts of Kesteven in the county of Lincoln, and in that portion of the parish known as the Fen, situate about three miles from the more populated part of the parish, known as the village of Heckington, and is rated to the relief of the poor in respect thereof.

The parish of Heckington is within the district of the Rural District Council of Sleaford, in the county of Lincoln, and is a contributory place within the meaning of s. 229 of the Public Health Act, 1875. The parish comprises about 5111 acres, having a population of about 1700, of which about 1000 dwell in the village of Heckington within an area of about 150 acres, from which area some portions of the said parish are distant four or five miles. The assessment of the houses and land outside the village is larger than that of the village, and no special drainage district has been formed within the said parish under s. 277 of the Public Health Act, 1875.

The Sleaford Rural District Council have provided that part of the parish of Heckington known as the "Village" with a supply of water, and, in order to construct the necessary works for such supply of water, the said council on April 29, 1895,

borrowed from the Public Works Loan Commissioners, with the sanction of the Local Government Board, the sum of 1350*l.* upon the security of all the separate rates leviable for special expenses works in the said contributory place of Heckington under the Public Health Act, 1875, and all and every other moneys and rates, if any, which the said council have power to mortgage for the purpose of securing repayment of the said sum and interest thereon, the loan being repayable by instalments spread over a number of years.

Pipes for conducting the water and stand-pipes for supplying the same have been put down throughout the village of Heckington, but no pipes have been laid beyond or stand-pipes erected at a greater distance than half a mile from the centre of the village. A few occupiers of property more than 200 feet from a stand-pipe (but not the appellant) have occasionally obtained and conveyed to their premises water from the stand-pipes.

On May 29, 1895, and before these works were completed, an application was duly made, pursuant to s. 10 of the Public Health (Water) Act, 1878, by eighteen persons rated to the relief of the poor in the said parish of Heckington, to the rural sanitary authority to charge water rates or water rents in respect of the water supplied or to be supplied.

In April, 1896, a water rate was levied upon the owners or occupiers of property in the parish of Heckington upon whom water rates or water rents are authorized and recoverable under the Public Health Act, 1875, and the Public Health (Water) Act, 1878, only, for the amount of the first instalment of principal and interest due in repayment of the said loan; and, upon objection being taken at the audit of the accounts of the rural district council by certain of the persons upon whom the said rate had been levied to the said instalment being charged as payable out of the said rate, the district auditor disallowed such charge, and amended the said accounts so as to charge the said instalment against the whole of the said parish, upon the grounds that the application under s. 10 of the Public Health (Water) Act, 1878, was made after the loan had been made upon the security of the rates of the parish, and that the

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only sums properly chargeable by a water rate on the consumers under s. 10 of the Public Health (Water) Act, 1878, were the actual working expenses of supplying the water. (1)

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 51, "Any rural authority may provide their district, or any contributory place, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may construct and maintain waterworks. . . ."

By s. 56, "Where a local authority supply water to any premises, they may charge in respect of such supply a water rate to be assessed on the net annual value of the premises. . . ."

By s. 229, "The expenses incurred by a rural authority in the execution of this Act shall be divided into general expenses and special expenses . . . . Special expenses shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a supply of water to any such place, and maintaining any necessary works for that purpose, if and so far as the expenses of such supply and works are not defrayed out of water rates or rents under this Act. . . . Special expenses shall be a separate charge on each contributory place."

By s. 230, "For the purpose of obtaining payment from the several contributory places within their district of the sums to be contributed by them, the rural authority shall issue their precept to the overseers of each such contributory place requiring such overseers to pay . . . . the amount specified in such precept to the rural authority. . . . The overseers shall comply with the requisitions of such precept with respect to special expenses . . . . by raising the contribution required by the levy (in the case of an entire parish on the whole of such parish, and in the case of a contributory place or part of a contributory place forming part of a parish by the levy on such place or such part thereof exclusive of the rest of the parish) of a separate rate in the same manner as if it were a rate for the relief of the poor . . . . Provided that when the amount required by any precept from a contributory place in respect of special expenses is less than ten pounds, or is so small that a rate less than one penny in the pound would be required to raise the same, the overseers shall not assess and levy any special rate for the same, but shall pay the amount as if it formed part of the contribution required from them in respect of general expenses."

By s. 233, "Any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any . . . . expenses . . . . to be incurred by them in the execution . . . . of this Act . . . . borrow . . . . any sums of money necessary for defraying any such . . . . expenses . . . . A rural authority may borrow . . . . such sums . . . . if applied, or intended to be applied, to special expenses of such authority on the credit of any rate or rates out of which such expenses are payable, and, for the purpose of securing the repayment of any sum so borrowed with interest thereon, they may mortgage to the persons by or on behalf of whom such sums are advanced any such . . . . rate or rates."

By the Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), s. 1,

On June 11, 1897, the overseers of the parish of Heckington, in order to comply with a precept of the said rural district council in that behalf, made a rate upon the whole of the parish of Heckington for special expenses incurred under s. 230 of the Public Health Act, 1875, being the amount of three instalments of principal and interest then due in respect of the said loan, and a demand-note was served upon the appellant, amongst other ratepayers, demanding payment of the sum of 4*l.* 3*s.* 11*d.*, being a rate of 8*d.* in the pound on the assessment of the hereditaments occupied by him in the said parish as hereinbefore stated.

The appellant refused to pay the said last-mentioned rate or any part thereof, and duly appealed against the same to the next court of quarter sessions held for the said parts of Kesteven in the said county, on the grounds that he should not have been rated at all; that the rate was not made on the proper persons; and that the amount for the raising of which the said rate was made ought not to have been charged on the property occupied by the appellant, but ought to have been raised by water rates or water rents to be paid by the consumers of water in the said parish of Heckington only."

By consent of the parties and by order of Grantham J. this case was stated, the parties agreeing that judgment in

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"This Act . . . . shall be construed as one with the Public Health Act, 1875."

By s. 9, "Where a rural sanitary authority have provided a stand-pipe or stand-pipes for the supply of water to any portion of their district, they may recover water rates or water rents from the owner or occupier of every dwelling-house within two hundred feet of any such stand-pipe, in the same manner in all respects as if the supply had been given on the premises . . . ."

By s. 10, "Where a sanitary authority, under the provisions of the Public Health Act, 1875, as amended by this Act, supply water in any urban district or in any contributory place, and an application is made to them by any ten persons rated to the relief of the poor in such urban district, or by any five persons so rated in such contributory place, to charge water rates or water rents in respect of the water so supplied, it shall be incumbent upon the authority to exercise the powers given to them by the Public Health Act, 1875, and by this Act, of charging water rates or water rents in respect of all water supplied by them in such urban district or in such contributory place."

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conformity with the decision of the Court should be entered at the quarter sessions according to the provisions of 12 & 13 Vict. c. 45.

Vesey Fitzgerald, Q.C. (*Bonsey* with him), for the appellant. The whole of the expenses of the water supply should be paid for by the persons who use the water, and not by those who, like the appellant, live in an outlying part of the parish, and to whom therefore it is no benefit. The power to supply water and to charge a rate for it is given to the rural authority by the Public Health Act, 1875, which, by s. 57, incorporates the Waterworks Clauses Act, 1847. By s. 68 of that Act water rates shall be recoverable "from the person requiring, receiving, or using the supply of water." These expenses must therefore be paid out of the water rates or rents, and the appellant cannot be called on to pay any part of them. No doubt, if it is impossible to raise the exact sum by water rates or rents, the residue, by s. 229, becomes a special expense; but by the proviso to s. 230, where the amount required is so trivial that it would not require a rate of a penny in the pound, the overseers are to pay it as general expenses and not to levy a special rate. The appellant does not dispute that if there is a small balance which is not met by the water rates or rents it may thus be paid as general expenses.

There is no difference between the capital expenses and the expenses of maintenance: both should, as far as is possible, be defrayed out of the water rates or rents.

Cunningham Glen (*Jenkin* with him), for the respondents. There is no hardship in calling on a contributory place to pay for the supply of water, although such supply may only be used by part of the contributory place. The supply is for both public and private purposes, and is for the general benefit. The provision of the water supply is expressly made a special expense by s. 229, and as such must be paid for by a rate on the whole contributory place. The water rates and rents are primarily intended to defray the expenses of the maintenance only of the works, and not the capital expenses of construction. This is shewn by the language of Mellish L.J. in *Corporation*

of Worcester v. *Droitwich Assessment Committee*. (1) If there is any hardship on outlying parts of the contributory place in having to pay for the supply of water to the village of Heckington, there was power for the rural authority, under s. 277 of the Public Health Act, 1875, to constitute part of the area a separate contributory place for the purpose of charging upon it the expenses of the water supply.

Vesey Fitzgerald, Q.C., replied.

Cur. adv. vult.

May 24. WILLS J. read the following judgment:—The parish of Heckington is one of a group of parishes forming the rural district of Sleaford. Within the parish of Heckington, and forming perhaps a twentieth part of the area of the parish, is the village of Heckington.

The district council have provided a supply of water for the village of Heckington, and in respect of the water supply they charge water rates. To provide the supply, however, they borrowed, on the security of the rates applicable to the purpose, a sum of 1350*l.*, repayable with interest by instalments. To pay some instalments overdue, with interest, they have made a rate upon the whole of the parish of Heckington. The appellant, who is rated in Heckington parish, but whose rateable property is two or three miles from the village, objects, and says that the whole of the expenses of providing the water supply ought to be paid out of the water rates payable by the consumers of water. To ascertain how this capital expenditure is to be paid involves a minute examination of a somewhat complicated set of enactments.

The district council succeed to the powers of the rural authority under the Public Health Act, 1875. By s. 51 they may provide their district, or any contributory place or any part of any such contributory place, with a supply of water sufficient for public and private purposes, and for that purpose may construct and maintain waterworks, dig wells, and do any other necessary acts. "Contributory places" are defined by s. 229, and in this instance the whole parish of Heckington is the contributory place involved.

(1) (1876) 2 Ex. D. 49, at p. 60.

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By s. 233 the district council may, with the sanction of the Local Government Board (which has been given), for the purpose of defraying any costs, charges, and expenses incurred by them in the execution of the Sanitary Acts or the Public Health Act, 1875, borrow any necessary sums of money.

The sums so borrowed are made chargeable, if applied to general expenses of the authority, upon the common fund out of which such expenses are payable (i.e., out of the rates levied upon the district generally); if applied to special expenses of the authority, upon any rates out of which such expenses are payable.

By s. 229 expenses incurred by a rural authority are divided into two classes—general and special expenses. General expenses are all such as are not special. The determining element is therefore to be sought in the definition of special expenses.

"Special expenses," says that section, "shall be the expenses of the construction, maintenance, and cleansing of sewers in any contributory place within the district, the providing a water supply to any such place, and maintaining any necessary works for that purpose, if and so far as the expenses of such supply and works are not defrayed out of water rates or rents under this Act," and other matters not material to this case.

Special expenses are by the same section made a separate charge on each contributory place.

The language is not happy. So far as sewers are concerned, the expenses connected with sewers in any contributory place, i.e., within that area, are made special expenses. So far as water supply is concerned, the cost of providing a water supply to any such place is what is made a special expense. The case of a supply to a part of the contributory place has been omitted. I believe this to be a mere slip of drafting, for the power of a certain number of ratepayers to require that water rates or rents shall be charged to consumers (the making of which charge in default of such requirement is optional with the rural authority) given by s. 10 of the Public Health (Water) Act, 1878, is to be exercised by the ratepayers of the contri-

butory place. Such a power would be absolutely unnecessary in the case of a supply to part of a contributory place unless the ratepayers of the contributory place generally are liable to the cost of water supply, and the restriction of the power to the ratepayers of the contributory place would be simply monstrous if they were not the only persons in the district so liable; in other words, if these were not "special expenses" within the section. It is, after all, no great stretch of language to treat the water supply to the part of the contributory place as (for the purpose of payment) a supply to the contributory place, if the contributory place has to pay for it, or for so much of it as is not covered by the water rates and rents.

The question does not arise in the present case, which grows out of an appeal under 12 & 13 Vict. c. 45, to the quarter sessions, the foundation of which is a notice of appeal which must (s. 1) state the grounds of appeal. The quarter sessions are precluded from entertaining any ground not stated in the notice, and so, therefore, is this Court. It was impossible, however, to discuss s. 229 without referring to it; and the variation of language which it exhibits has led us to an elaborate consideration of all the enactments bearing upon the meaning of the incomplete phraseology with the result we have indicated; and although we have felt bound to allude to this matter, we have no intention of casting any doubt upon the correctness of the assumption upon which this case has been argued, and which we believe has been generally recognised in practice, namely, that the supply of water to part of a contributory place is included in the expression in s. 229, "a supply to any such place."

The objection raised by the appellant is of quite a different character. It is that the whole of the cost both of construction and maintenance of the necessary works and of the supply generally must be paid out of the water rates or rents so far as is arithmetically possible, and that the expression "if and so far as the expenses of such supply and works are not defrayed out of water rates or rents," which implies that there may be a balance not covered by those sources of income, is intended only to meet such trivial portions of the expenses as fall within

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a proviso to s. 230, which says that where the amount required by any precept from a contributory place in respect of special expenses is less than 10*l*., or so small that a rate of less than a penny in the pound would be required to raise the same, the overseers to whom the precept is directed shall not assess and levy any special rate for the same, but shall pay the amount as if it formed part of the contribution required from them in respect of general expenses. I cannot think that this view is right.

By s. 56 of the Public Health Act, 1875, where the authority supply water to any premises they may, and by s. 10 of the Public Health (Water) Act, 1878, if required by a certain number of ratepayers of the contributory place within which they supply the water, they must, charge in respect of such supply a water rate to be assessed upon the net annual value of the premises to which the water is supplied, or they may enter into agreements for the supply of water, in which case the charge is called a water rent—not a water rate. There is nothing at all to indicate the scale of charge or to give a limit in either direction. The supply of water is to be paid for by the consumer excepting in certain cases in which, upon a report from the surveyor of the authority, it appears that a house is without a proper water supply and the cost is very small, or fixed at such an amount as the Local Government Board may think reasonable under all the circumstances, and, except in the limited class of cases to which the elaborate machinery of s. 3 of the Public Health (Water) Act, 1878, applies, there is no power to compel any one to take water from the supply provided, nor, except in the case of persons who live within 200 feet of a stand-pipe, to compel any one who does not take water to pay for it. Under such circumstances it is obvious that the authority must do like any one else who has a commodity to sell which the customer may buy or not as he likes. They must make their price sufficiently low to attract custom. If the whole expense—or the whole except a sum too small to make another penny in the pound in the water rate—had to fall upon the consumers, and they had to pay an extravagant price, they would, whenever they could, do without it, and the people who

would have to pay the whole cost of the water supply would be the persons who could not do without it, and the persons who lived within 200 feet of a stand-pipe. There would be, to say the least of it, a temptation to set up a great number of stand-pipes.

It is impossible to suppose that anything of the kind was intended. It is of the essence of legislation of this kind that works necessary or desirable for the sake of health should be paid for by the inhabitants at large of the chargeable unit, though the direct benefit may accrue only to a portion, perhaps to a small portion, perhaps even only to one of the inhabitants. What is A.'s turn to-day may be B.'s turn to-morrow. Very often the works are too expensive to be borne by those directly benefited, and had they to be so borne they could not be done at all. The whole community very often benefits indirectly, and, even if they do not, the turn of those now left out in the cold may come, and other works for their peculiar benefit may likewise be done at the general expense. It is of no purpose to put extreme cases, and to shew that very unreasonable things might be done by the local authority. All legislation which confers powers upon authorities of any kind is founded upon the assumption that they will act reasonably; nor is that expectation disappointed as a general rule, so far as one may judge from the cases—numerous as they are—which bring under the review of the Courts the proceedings of local authorities. Large powers for good involve the theoretical possibility of doing high-handed and unreasonable things. An observation which perhaps touches more closely the present case is that legislation of this kind has necessarily a very wide and general application, and that, although it may appear to the appellant hard that he should have to pay for the cost of works to supply water to people three miles off, the operation of a general enactment cannot depend upon whether the parish is one mile long or ten, or whether the particular area supplied is at one end or the other of the parish.

It is to be observed, further, that the water supply may be for both private and public purposes. Public purposes, though carried out only in one part of a contributory place, may be of

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very general benefit, not only to the consumers of the water supplied, but to others, and to persons who live outside the area of the water supply, and it cannot be supposed that expenses applicable to such purposes were intended to be paid exclusively by the persons taking the supply for their own private purposes.

In the operation of s. 229 no distinction, as it seems to me, can be drawn between capital and current expenditure. Both fall within the category of special expenses. In relief of both is to be carried to the account any sum which can practically and reasonably be raised by water rates and water rents. Of such reasonableness and practicability the local authority must be the only judges. When the amount required has been reduced by the sum raised by the water rates and water rents, the balance, so far as it is capable of being estimated by unbroken pence in the pound in a rate upon the contributory place, is to be charged upon and paid for by the contributory place. There is nothing to shew that in the present instance the proper deductions have not been made, or that any portion of the water rates and rents has been available to reduce the sums required to meet the instalments of debts and the interest in arrear; and I am of opinion, therefore, that the rate was rightly made, and the appeal must be dismissed with costs.

KENNEDY J. read the following judgment:—I have had the opportunity of considering the judgment which Wills J. has just delivered. I agree in the result of that judgment, and, generally, in its reasoning. I desire only, as the case is one of some importance, to add a few words. We are asked by the appellant to say that it is incumbent on the rural district council to repay the instalments of principal and interest on the loan, contracted for the provision of a water supply to Heckington, by means of water rates and water rents to be charged to the consumers of water only, including therein the persons who are made chargeable under s. 9 of the Public Health (Water) Act, 1878. The respondents contend that it is not in their power, and further that, even if it is in their power, it is not incumbent upon them, to take this course.

It is upon these contentions in substance that our judgment is sought. In my view, it is clearly not incumbent upon the respondents to lay the whole burden, not merely of the cost of the supply of water and maintenance of works, but of capital and expenditure in providing the works (and interest upon that expenditure), upon these private consumers. There is no statutory direction that this should be done; and, for the reasons given by my brother Wills, and especially having regard to the fact that, I suppose, in this case, as in most cases of the kind, capital will have been expended to supply, not merely the wants of private consumers, but the wants of the community generally in regard to public purposes under s. 51, I should think that it would often be unjust, as well as impolitic, in the interests of the public health, that such a compulsion should exist. As I hold this view, it is not necessary for the decision of this appeal to say whether, although it is not obligatory, it is competent for the rural district council to include in the water rates and water rents of the contributory place provisions for the repayment, wholly or in part, of the capital borrowed, and the interest on that capital. As, however, so much has been argued upon this point, I think it right to say that, having regard to s. 229 of the Public Health Act, 1875, and the provisions of the Public Health (Water) Act, 1878, I have come, though not without some hesitation, to the conclusion that this is permissible, if the local authority—to which one must presume, as has been pointed out, a certain discretion has been confided—think that, having regard to all the circumstances, it is right and practicable that such a course should be taken. They must, in deciding whether it shall be taken or not, exercise a discretion in the public interest—a discretion which ought, as it seems to me, to be governed, at least in great part, by regard to the inducement to the inhabitants of the area supplied to take good and wholesome water, which would be afforded by the imposition upon consumers of only a moderate charge.

As against this view, reliance was placed on the language used by Mellish L.J. in delivering the judgment of the Court of Appeal in *Corporation of Worcester* v. *Droitwich Assessment*

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Committee. (1) The decision in that case was not upon the Public Health Act, 1875, or the Public Health (Water) Act, 1878. It was a decision upon somewhat different, though in many respects no doubt analogous, provisions of the Public Health Act, 1848; and the point decided by the Court in that case was, not whether the water rate or water rent charged to the consumer might include provision for capital expenditure on the provided works, but whether it might include a profit beyond the amount required for the maintenance of the works. Looking at the provisions with which we have to deal, but which the Court of Appeal in that case had not, and especially s. 229 of the Public Health Act, 1875, I do not think that the passage referred to can fairly be relied upon either as direct authority, or even as the expression of judicial opinion, against the view to which, upon the whole, I have come upon this branch of the case. But, however the question of the power to provide out of the water rates or water rents for the payment of instalments of borrowed capital and interest due ought to be decided, if this course is not obligatory upon the rural authority this appeal fails; and I agree with my brother Wills that there is no such obligation.

Appeal dismissed.

Solicitors for respondents: *Patersons, Snow, Bloxam & Kinder, for Peake, Snow & Son, Sleaford.*

Solicitors for appellants: *Trass & Jarmain, for Millington & Simpson, Sleaford, and Jessopp & Godson, Sleaford.*

(1) 2 Ex. D. 49, at p. 60.

A. P. P. K.

THE QUEEN *v.* DR. TRISTRAM, JUDGE OF THE CONSISTORY COURT OF LONDON.

1898
May 12, 13.

Ecclesiastical Law—Faculty—Jurisdiction of Ordinary over all Bodies buried in Consecrated Ground—Licence of Secretary of State—Exhumation for Purposes of Verification—Burial Act, 1857 (20 & 21 *Vict. c.* 81), *s.* 25.

The jurisdiction of the Ordinary over all bodies buried in consecrated ground is not affected by s. 25 of the Burial Act, 1857, which requires the licence of a Secretary of State for the removal of any body from any place of burial unless it be removed from one consecrated place of burial to another by faculty granted by the Ordinary.

The Ordinary may grant a faculty for the exhumation, for the purpose of identification, of a body which has been buried in consecrated ground, and the licence of the Secretary of State is not a condition precedent to the grant, although the faculty may be inoperative until the licence has been obtained.

Semble: A body buried in consecrated ground cannot be removed without the sanction of the Ordinary.

RULE NISI for a prohibition to Dr. Tristram, Q.C., the judge of the Consistory Court of London and Chancellor of the Diocese.

On March 9, 1898, an ex parte application was made to Dr. Tristram by petition, on behalf of a Mrs. Druce, for a faculty giving the petitioner leave and licence to open a certain vault in the consecrated portion of the North London Cemetery at Highgate, and to open the lid of the coffin interred in that vault purporting to contain the remains of one Thomas Charles Druce, and to inspect the contents thereof, in order to ascertain whether the coffin actually contained the human remains of the said Thomas Charles Druce, or any human remains at all. The judge having heard the evidence, and being satisfied that the object of the investigation was to prove that T. C. Druce did not die at the date alleged and so to institute proceedings to revoke the probate of his will, decreed a faculty in the terms prayed in the petition.

On March 15, Dr. Tristram at chambers gave leave to the surviving executor of Thomas Charles Druce and certain of his descendants to intervene and enter an appearance and file an answer denying the averments in the petition.

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The executor and relatives, however, obtained this rule for a prohibition.

It appeared from a note of the practice of the Consistory Court of London, now furnished to the Court by Dr. Tristram, that where the judge of the Consistory Court decrees a faculty on an ex parte application, the faculty does not issue from the registry until fifteen days from the date of the decree. During the interval, should it be ascertained in the registry that there are any persons having sufficient interest to oppose the faculty, notice is given to them by the registry of the application that has been made; and should any person with adverse interests enter an appearance in opposition to the faculty before it is issued, the ex parte order is superseded and a suit is commenced.

Arnold Statham (*Campbell Johnston* with him), for Mrs. Druce, shewed cause against the rule. Prohibition will not lie. The judge of the Consistory Court representing the Ordinary was acting within his jurisdiction in granting this faculty. The jurisdiction of the Ordinary over all bodies interred in consecrated ground is recognised by s. 25 of the Burial Act, 1857. The object of that section was merely to give an additional safeguard and to provide a definite penalty for removing a dead body without authority, which was always a misdemeanour at common law: *Reg.* v. *Feist.* (1) From the earliest times down to 1857 the ecclesiastical authorities had exclusive jurisdiction over consecrated ground, and have exercised that jurisdiction in granting faculties for the removal of bodies from such ground: *Foster* v. *Dodd* (2); *Adlam* v. *Colthurst.* (3) Bodies could not be disinterred without a faculty: *Vestry of St. Pancras* v. *Vicar and Churchwardens of St. Martin's-in-the-Fields.* (4) Nor was the jurisdiction of the Ordinary limited to cases where it was desired to remove a body for the purpose of re-interring it elsewhere. Faculties have been granted to exhume a corpse for the purpose of establishing its identity: *In re Sarah Pope* (5), and for the purpose of

(1) (1858) Dears. & B. C. C. 590.
(2) (1867) L. R. 3 Q. B. 67, at p. 77.
(3) (1867) L. R. 2 A. & E. 30.
(4) (1860) 6 Jur. (N.S.) 540.
(5) (1851) 15 Jur. 614.

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taking papers out of the coffin which had been buried with the body: *In re Edward Hall* (1); see Oughton's Ordo Judiciorum II. cccxxxi. The Burial Act, 1857 (2), does not in any way affect this jurisdiction. At the most it gives a concurrent jurisdiction to the Secretary of State. The proper remedy, if the Ordinary wrongly exercises his jurisdiction to grant the faculty, is by appeal and not by prohibition. This application is premature, since the applicants have been allowed to intervene, and therefore the decree on the ex parte application is superseded: *Corporation of London* v. *Cox.* (3) [He also cited *Serjeant* v. *Dale* (4); *Rector of St. Michael's Bassishaw* v. *Parishioners of Same* (5); *Lee* v. *Hawtrey.* (6)]

Bargrave Deane, Q.C. (*G. G. Phillimore* with him), in support of the rule. The Burial Act, 1857, is conclusive. Even if a faculty is needed, the licence of the Home Secretary for the exhumation of the body is a condition precedent to its being granted. The precedent in Oughton II. cccxxxi., and *In re Sarah Pope* (7), which are the only cases in point, were before the Act was passed, and are therefore of no authority. No doubt a faculty was granted in *Rector of St. Michael's Bassishaw* v. *Parishioners of Same* (5); but that was after an Order in Council under s. 23, which answers to the licence of the Secretary of State under s. 25. That was a case of removing bodies for the purpose of re-interment, which is specially excepted by s. 25. In every other case of exhumation of human remains the licence of the Secretary of State must be first obtained before any steps are taken.

The faculty has been decreed on an ex parte application and without giving the applicants any opportunity of being heard.

(1) (1893) Not reported.

(2) By the Burial Act, 1857 (20 & 21 Vict. c. 81), s. 25, "Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial without licence under the hand of one of Her Majesty's principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence."

(3) (1866) L. R. 2 H. L. 239.

(4) (1877) 2 Q. B. D. 558.

(5) [1893] P. 233.

(6) [1898] P. 63.

(7) 15 Jur. 614.

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WILLS J. I am of opinion that this rule should be discharged.

A prohibition can be granted only if there is want of jurisdiction.

The Ordinary, as represented here by the judge of the Consistory Court, is clearly the person in whom jurisdiction over all things which are necessary to be observed for the decent and respectful treatment of the dead in consecrated places of burial is vested. He is the proper person to see that all conditions which the laws of the Church require in relation to the bodies of persons buried in consecrated places of burial are observed, and he has exercised a very ancient jurisdiction to control all matters of that kind. From very ancient times he has exercised an undisputed jurisdiction to grant faculties for the removal of bodies from one consecrated place of burial to another. He also possessed a wider jurisdiction in such matters, as is clear from the case of *In re Sarah Pope* (1), which was tried before Dr. Lushington, a very great authority. It is clear from Dr. Lushington's judgment in that case that he considered the jurisdiction to extend beyond a mere case of the removal of a body for the purpose of re-interment, and he, a very learned ecclesiastical lawyer (and a man not the least disposed to extend the legitimate limits of his jurisdiction), upon a proper case being made out for the examination in the interests of justice of the contents of a coffin long buried, granted the application. That decision is a very strong authority for supposing (which certainly general principles would lead one to suppose) that the jurisdiction of the Ecclesiastical Court was not confined to cases where for one purpose or another it is necessary or desirable to remove a body from one consecrated place of burial to another, and one can hardly suppose that the authority in whom the custody of the remains of the dead is vested ought to be prevented from exercising his authority, if the paramount claims of justice and public interest require it to be exercised. Therefore I really cannot doubt that the application to the Ordinary as represented by the judge of the Consistory Court was within his jurisdiction. If so, we cannot grant a prohibition unless

(1) 15 Jur. 614.

he has done something that is against the law of the land, or unless he has misinterpreted an Act of Parliament. He has simply followed what he tells us is the practice of the Ecclesiastical Court, and what seems to be a reasonable and just practice, on very much the same lines on which we exercise our own jurisdiction in these courts. He has entertained the application ex parte. It may be that sometimes the proper persons to cite on such an application are not known until the matter is gone into; but anyhow he has entertained the application ex parte, which he says is the regular course of procedure, and, treating it as an ex parte application, he has given what is called a judgment, that is to say, he has said what on the present materials, if they are unaltered, he is prepared to order. Now, if there are persons whose interests are affected and who ought to be heard, and who have not had an opportunity of being heard, and if that judgment were final, one would say it was a proceeding which was against natural justice and against the laws of the land, and that the judge ought to be prohibited; but he tells us that the practice of the Ecclesiastical Court in such matters is what appears to me very reasonable, namely, that upon an order ex parte of this nature being made it remains in the registry for fifteen days. I suppose some notice is given of it (I do not know how that may be); but an opportunity is given to anybody who is interested to intervene and to shew that the faculty or order has been granted without full knowledge of the circumstances, and without hearing the opponents. Under those circumstances, he tells us, if the interveners come in within the specified time, the order which has already been given is treated as a nullity and is superseded, and the matter proceeds to a regular hearing, when the persons interested in opposing the granting of the faculty are heard. I cannot conceive that there is anything unreasonable in such a practice. It is clearly analogous to that which relates to garnishee orders and to the service of writs out of the jurisdiction of the High Court. As it seems to me, therefore, the judge of the Consistory Court has done nothing which is against the general law of the land, against justice, or against propriety.

But then it is said there is another ground upon which the

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intervention of this Court should be exercised. That is, that under s. 25 of the Burials Act of 1857 the judge ought to have waited until the licence of the Home Secretary had been got to remove this body before entertaining the question whether the Ecclesiastical Courts would allow it to be removed or not. I can see nothing whatever in the section which justifies any such construction, and indeed there is one part of it which I think shews that it cannot be the case. The section says that except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary, no body shall be removed from the ground without the licence of the Secretary of State. When an application, therefore, is made to the judge of the Ecclesiastical Court for a faculty to disinter a body buried in consecrated ground, he has got to see what the circumstances are. If the circumstances are such as to bring it within the exception, inasmuch as the licence of the Secretary of State is not required, there is no need, it is clear, to wait for such a licence; and, in my judgment, if the circumstances are such that it does not fall within the exception, and, therefore, the licence of the Secretary of State is necessary for the exhumation, there is nothing in the section to justify the conclusion that the judge of the Ecclesiastical Court is to wait until such licence has been granted to consider whether it is a proper case for what I may call ecclesiastical sanction to be given for the disturbance of the remains. If the Secretary of State grants his licence and the burial has taken place within consecrated ground, the consent of the Ordinary must be obtained; and when two concurrent consents are necessary, what is there to say that the licence of the Secretary of State shall precede even an application to the Ecclesiastical Court for the ecclesiastical sanction? As it seems to me, it comes to this: the ecclesiastical sanction is inoperative in a case where the licence of the Secretary of State is made necessary by the section, unless such licence is obtained, but there is nothing in the section to make the one application necessarily precede the other. On the other hand, I cannot help thinking that amongst the materials which the Secretary of State would be glad to have before him in considering whether he should grant the

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licence or not would be a well-considered review of the facts, and a well-considered judgment upon them by a competent authority, which certainly is not disposed rashly, improperly, or irreverently to sanction the removal of dead bodies from a consecrated place of burial for the purpose of idle curiosity or any unworthy or improper reason. I therefore think that this application is entirely unfounded, and that there is nothing in the section to prevent the Ordinary from exercising his jurisdiction. It is perfectly true that the order will be an order in the ancient form, whatever that is; but there is no difficulty in the order being unqualified so far as the Ecclesiastical Court is concerned, and in Parliament stepping in and saying it shall not be acted upon until the licence of the Secretary of State has been obtained. As to whether this case falls within the exception or within the general part of the section forbidding a removal without the licence of the Secretary of State, I express no opinion whatever. We have not the means of forming any opinion, nor is this the time at which to entertain such an application, and it is not a matter, it seems to me, that in any way affects the jurisdiction of the Ecclesiastical Court to say whether a proper case has been made out for the ecclesiastical leave. If the order or faculty should be obtained, and if the case does not fall within the exception, which can only be seen after the evidence has been heard, and if any improper use is attempted to be made of the faculty, undoubtedly the person who attempted to make such improper use of it could be dealt with criminally under this section, or could be enjoined by the order of this Court from taking any proceedings under the faculty. Therefore there is no reason whatever, as far as I can see, why the ancient jurisdiction of the Ecclesiastical Court to give all that it can give, namely, ecclesiastical sanction, should be interfered with.

KENNEDY J. I am of the same opinion. The rule here, which in my opinion should be discharged, was a rule to shew cause why a writ of prohibition should not issue, directed to the judge of the Consistory Court of London to prohibit him from further proceeding in the matter of a certain petition to

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the said Court of Anna Maria Druce, praying for a licence or faculty to remove the boards of the coffin alleged to contain the remains of Thomas Charles Druce interred in a brick vault in the consecrated ground of Highgate Cemetery. Now, I see no ground for that rule. The only ground for prohibition would be that for some reason the judge, to whom it is asked that prohibition should issue, is doing or is about to do something outside his jurisdiction. Is the judge here doing, or proposing to do, anything which is outside his jurisdiction? What he is proposing to do is, so far as I gather, to hear the evidence in favour of and in opposition to the petition of Anna Maria Druce, and to give a judgment when he has heard that evidence. I understand Mr. Bargrave Deane not to deny that the subject-matter of the petition would be clearly within his jurisdiction but for the Act of Parliament, and we cannot assume that any judgment that he will pronounce, when he has heard both sides, will be a judgment outside the limits of his jurisdiction. Having had a petition before him praying for something which on authority and precedent he had power and jurisdiction to grant, and not having before him opposition, he followed what appears to be the admitted practice of the Court, namely, that he made a decree which would remain a certain number of days in the office; the faculty so decreed was not to issue if any persons who are interested or claim to be interested intervene. Such persons have obtained leave to intervene and to file within a certain number of days an answer denying the allegations made in the petition. When they have made their opposition effective in this way the decree is superseded (to use the judge's own words), and the matter will be dealt with and adjudicated upon as a new matter. They have availed themselves of their right to intervene, and they can be heard, and they may succeed in persuading the learned judge that it is not in accordance with justice to grant the prayer of the petition—in which case the whole application falls to the ground. Or he may after hearing them still think that the petitioner has made out a sufficient case and grant a faculty. The Court, it appears to me, is bound to presume that, if he does so, he will make no decree that goes beyond his jurisdiction. If he comes to the conclusion that this

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application, though he decides to grant it, is one which does not come within the exception to the section, he will have to consider whether he should not limit in its terms the faculty which he grants by some such words as "subject to the licence being obtained from the Secretary of State." But even if he omits to give that direction, then, as my brother Wills pointed out, the faculty, if the case does not fall within the exception, is operative only so far as the ecclesiastical permission is concerned; and any one who presumes to act upon that ecclesiastical authority without obtaining the licence of the Secretary of State does so at the risk of punishment. I should say also that if the case does not fall within the exception and a faculty is granted, it would be open to the present applicants to appeal from that decision. At present the learned judge of the Consistory Court has made a decree ex parte which is now about to be superseded if, after the leave given to intervene, it cannot be treated as actually superseded, until the interveners have put in their answer to the petition. The making of that decree was within his jurisdiction as an Ecclesiastical Court. We are not going to decide now whether the case is one which will or will not require also the licence of the Secretary of State; but it is clear that the learned judge has done nothing, so far as his court is concerned, which trenches upon the provisions of the Act of Parliament requiring except in one case the civil licence. The rule, therefore, must be discharged.

Rule discharged.

Solicitors for applicants: *Freshfields & Williams.*
Solicitors for respondents: *Macarthur & Co.*

A. P. P. K.

1898
June 30.

CULLEN *v.* KNOWLES AND BIRKS.

Practice—Pleading—Action by one of two joint Promisees—Refusal of Other to join as co-Plaintiff—Power to add as co-Defendant.

One of two joint promisees can maintain an action on the contract, making the other joint promisee a co-defendant if, after tender of an indemnity against costs, he refuses to be joined as a co-plaintiff.

ACTION tried before Bigham J. without a jury.

The action was brought on an agreement dated September 9, 1897, and made between the plaintiff Cullen and the defendant Birks of the one part, and the defendant Knowles of the other part, whereby Cullen and Birks, who were the owners of a patent, sold it to Knowles for 1600*l*. The action was brought to recover the sum of 1600*l*. The defence set up by Knowles was that he had been induced to enter into the contract by misrepresentation. It appeared that the plaintiff Cullen had applied to Birks to join with him as co-plaintiff in bringing the action against Knowles, and had tendered to him an indemnity against all costs that might be incurred by him. Birks, however, had refused his consent, and Cullen accordingly made him a co-defendant to the action.

A. T. Lawrence, *Q.C.*, and *R. Coventry*, for the plaintiff.

Buckmaster (*R. Harington* with him), for both the defendants, took a preliminary objection. The action will not lie. One of two joint covenantees cannot sue without joining his co-covenantee as co-plaintiff: *Wetherell* v. *Langston* (1); and he cannot get over the difficulty by adding the other co-covenantee as a defendant in the action. By Order XVI., r. 11, a person cannot be joined as a plaintiff without his consent in writing, and even if he be indemnified against costs he cannot be added without his consent: *Tryon* v. *National Provident Institution*. (2)

A. T. Lawrence, *Q.C.*, for the plaintiff. The action will lie.

(1) (1847) 17 L. J. (Ex.) 338. (2) (1886) 16 Q. B. D. 678.

All the parties to the contract are before the Court. That is the object of the rule which forbids one of several joint contractors to sue alone. Birks having refused to join in bringing the action although an indemnity against costs was tendered to him, it is clear that there were no means of adding him as plaintiff: *Jackson* v. *Kruger* (1); *Turquand* v. *Fearon*. (2) The plaintiff Cullen would therefore be without a remedy unless he can bring his co-promisee before the Court by adding him as a co-defendant. The practice is common on the Chancery side for one of several co-mortgagees to make his co-mortgagees defendants if they are unwilling or unable to join him as co-plaintiffs in an action: *Luke* v. *South Kensington Hotel Co.* (3) Jessel M.R. in that case treats it as a settled rule of practice.

Buckmaster, in reply. The Chancery practice of adding as defendants co-mortgagees or co-trustees who are unwilling to sue as plaintiffs is confined to foreclosure actions, and cannot be extended to actions of contract.

BIGHAM J. This is an action brought by one of two joint promisees. It is perfectly clear that no action can be maintained by one of two joint promisees unless the other promisee is also a party to the action. It is usual for the joint promisees to be joined as joint plaintiffs if they are bringing, and as joint defendants if they are defending, the action. In this case, however, the other joint promisee has refused to join as a plaintiff in bringing the action although he has had tendered to him an indemnity against the costs of the action. It seems that he was within his right in so refusing. That is clear both from the authorities and from Order XVI., r. 11, which provides that no person shall be added as a plaintiff without his own consent in writing. The question, therefore, here is whether such refusal prevents his co-promisee from suing at all, or whether he can get over the difficulty by joining the co-promisee, who refuses to join as plaintiff, as a defendant. I think that he can do so. I can see no difference between this case and the cases on the Chancery side of several co-mortgagees,

(1) (1885) 52 L. T. (N.S.) 962. (2) (1879) 4 Q. B. D. 280.
(3) (1879) 11 Ch. D. 121.

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where it is clear that co-mortgagees who are unwilling to join as plaintiffs can be made defendants in an action by one of the co-mortgagees to foreclose. The object of this is to get all the parties interested in the litigation before the Court; and when they are once before the Court, whether as plaintiffs or defendants, there is no reason why the action should not go on. In Chancery I understand that, although only one of the mortgagees is the plaintiff in the action, judgment may be given in favour of all; and if, after hearing this action, I should come to the conclusion that the co-promisees in this case are entitled to some relief, I shall have no difficulty in giving judgment for both, although one is plaintiff and the other defendant. The trial must therefore proceed.

[The action was then tried, and after hearing the evidence the learned judge held that the defence had not been made out, and entered judgment for Cullen and Birks for 1600*l*.

Judgment accordingly.]

Solicitors for plaintiff: *Lee & Watts, for Burton & Briggs, Nottingham.*

Solicitor for defendants: *Charles Beatty.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
1898
April 29.

In re CRONMIRE.
Ex parte WAUD.

Gaming—Purchase and Sale of Shares—Payment of Differences—Balance due from Broker—Purchase of Shares from Broker—Balance to be taken in Payment—Breach of Contract by not delivering—"Cover"—"Money deposited to abide the Event"—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

Gaming contracts between a stockbroker and his client, for differences on the sale and purchase of stocks and shares, resulted in a balance in favour of the client. It was agreed that the broker should sell certain stock to the client which he would accept in payment of the balance due to him, and in pursuance of this agreement a contract note was forwarded by the broker. The stock was not delivered, and the client sought to prove in bankruptcy, against the estate of the broker, for damages for non-delivery of the stock:—

Held, reversing the judgment of Wright J., that, as the balance resulting from the gambling transactions could not have been recovered from the broker, there was no consideration for the promise to deliver the stock, and no proof could be admitted in respect of the non-delivery.

The client had deposited money with the broker as cover to secure him against loss on the gaming transactions which had resulted in a balance in favour of the client:—

Held, affirming the judgment of Wright J., that, the money deposited not having been used for the purpose for which it was deposited, proof in respect of the amount was admissible.

MOTION by way of appeal by A. E. Waud from the rejection by the trustee of a proof against the estate of the bankrupt.

The facts, which are fully set out in the judgment, were shortly these: Cronmire carried on business as an outside broker, and had transactions with Waud which purported to be sales and purchases of stocks and shares and resulted in a balance in favour of Waud. An agreement was then come to for the sale by Cronmire to Waud of Great Eastern Railway and Dover "A" Stock, and contract notes were forwarded accordingly. It was agreed that the balance in the hands of Cronmire should be taken in payment of the Great Eastern Stock, and in part payment of the other stock. The stocks

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CRONMIRE, *In re.* WAUD, *Ex parte.*

were not delivered. Cronmire died, and his estate was administered in bankruptcy. Waud sent in a proof for the amount of the balance, and also for an amount of money deposited with Cronmire as cover. The trustee rejected the proof on the ground that both claims arose on gambling transactions. An issue was directed whether the transactions were by way of gaming and wagering. It was tried before a jury, who found that all the transactions up to the time when the above-mentioned balance was found to be due to Waud were gambling transactions, but that both parties intended the transactions, with regard to the stock subsequently directed to be purchased, to be real and not by way of gambling.

On this appeal to Wright J. against the rejection by the trustee of Waud's proof, the claim to prove for the balance was abandoned, and a claim was substituted to prove for damages for the non-delivery of the Great Eastern and Dover "A." stock.

Jan. 24. *H. Reed, Q.C.*, and *Israel Davis*, for Waud.
Robson, Q.C., and *Macaskie*, for the trustee in bankruptcy.

The arguments are sufficiently noticed in the judgment, and, in addition to the authorities there cited, the following were referred to: *Edwards* v. *Baugh* (1); *Laycock* v. *Pickles* (2); *Dawson* v. *Remnant* (3); *Cook* v. *Wright* (4); *Callisher* v. *Bischoffsheim* (5); *Hill* v. *Fox*. (6)

Cur. adv. vult.

Feb. 19. WRIGHT J. read the following judgment:—During a part of 1896 and in January, 1897, there had been transactions between Cronmire, carrying on business, not as brokers, but as "outside" dealers in stocks and shares, under the name of Gregory & Co. and Waud. In form these transactions purported to be sales and purchases of stocks or shares, but in substance, as the jury have found, they were contracts merely

(1) (1843) 11 M. & W. 641.
(2) (1863) 4 B. & S. 497; 33 L. J. (Q.B.) 43.
(3) (1806) 6 Esp. 24.
(4) (1861) 1 B. & S. 559.
(5) (1870) L. R. 5 Q. B. 449.
(6) (1859) 4 H. & N. 359.

for differences. On February 1, 1897, Cronmire rendered an account shewing himself debtor to Waud for about 375*l.* On February 8 Waud gave an order, which is not produced, but was no doubt similar to the subsequent order of April 3, and was to buy for investment 200*l.* Great Eastern Stock, and on the same day Cronmire answered by telegraph, "Sold you 200 Easterns 113⅜ investment"; and he sent to Waud a contract note of the same date stating that he had sold to Waud for the account of February 12, 200*l.* Great Eastern Stock for 228*l.* 12*s.* 6*d.* "to be taken up." No cover was given or asked for in respect of this stock. By the seventh of the conditions indorsed on the back of the contract note the vendor states that he is prepared to deliver the stock to which the contract refers, if demanded, but requires in that event cash on the first day of the account in payment of the stock. On the next day, February 9, Waud wrote as follows: "With regard to the 200*l.* Great Eastern Railway Stock, would you please take it off the market to-morrow and place it in the name of A. E. Waud, &c., and forward the transfer to me when ready for signature? As I have now only one stock open, there is ample balance in hand for payment of the Great Eastern Stock, which please use for that purpose, &c." Cronmire made no objection to this proposal, but acted on it by debiting Waud with the price of the stock and the stamp and fees, and promising to send transfers; and from time to time Waud pressed for delivery, and Cronmire continued to promise it until his death on April 16. The jury have found, and no doubt rightly, that this was a real transaction, i.e., that both parties intended an actual purchase and sale of the 200*l.* Great Eastern Stock for delivery. After Cronmire's death Waud put in a proof in the administration for the balance appearing to be due to him on his general account with Cronmire, but he now asks to substitute a claim for damages for the non-delivery of the Great Eastern Stock, and it is agreed that, subject to the question of costs, the proof is to be treated as amended in that sense.

The objection raised by the trustee is that, as he contends, there was no consideration for Cronmire's promise to deliver the stock, because Cronmire was not to get anything for it

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except a discharge from, or a set-off of, a claim for gambling differences, the payment of which Waud could not have enforced. It seems to me that the trustee's contention ought to prevail if, as Waud in his affidavit says was the case, the bargain for the Great Eastern Stock was at the time when it was made a bargain that the stock should be paid for in that way. In that view Waud's claim would in reality be a claim to enforce payment of gambling differences, not indeed in specie, but in the form of their equivalent in stock. But Waud ought not to be held to that view if it clearly appears that he, or rather the person who drew his affidavit, has mistaken the facts. I think that does appear. Cronmire's telegram and contract note of February 8 shew a written and real agreement made on that day, by which Waud became bound to take up and pay in cash on the first day of the account, and Cronmire became bound to deliver on such payment being made; and so the jury have found. There was, then, a contract free from any objection, though conditional on the money being provided by Waud. This condition could have been waived by Cronmire, and in that case he could have sued Waud for not accepting, as Waud on performing the condition could have sued him for not delivering, the stock. The next day, as appears by Waud's letter of the 9th, Ward for the first time proposed that, instead of cash passing, the payment should be made out of the balance due to him, and Cronmire assented. That relieved Waud from the necessity for performing the condition of payment in cash, but did not otherwise alter Cronmire's conditional contract to deliver, which was a good contract when it was made. If a contract is made for good consideration, I cannot see that it can become invalidated merely because a party afterwards consents to accept in lieu of the good consideration, which he could have enforced, a different consideration which is of uncertain value, or even of no value.

A further claim is made by Waud for damages for non-delivery of stock known as Dover "A," which was sold to him by Cronmire on April 3. The material facts are the same as in the first claim, except that, as appears by Cronmire's letter

of April 5, this second transaction was from the first intended to be on the terms that payment should be made partly by setting off the gambling balance due to Waud. This intention, however, was not expressed in the contract. Moreover, a material part of the consideration, namely, 81*l.* 17*s.* 3*d.*, was to be paid by Waud in cash, and there was therefore, at any rate to this extent, consideration for Cronmire's promise, and the result appears to me to be the same, though for a different reason.

A third claim is also made by Waud for the repayment of moneys amounting to about 60*l.*, which were advanced by him in separate sums at different times by way of specific "cover" on specific and separate gambling orders. These sums have never been appropriated or required for covering losses. The return of them was never demanded until after the administration order, nor was any notice given revoking the authority to apply them as cover. But as regards the sums now in question, the events in respect of which they had respectively been deposited had resulted in Waud's favour, and there was no longer any reason for the retention of them by Cronmire. The trustee contends that these sums are irrecoverable as being, within the meaning of the Gaming Act (8 & 9 Vict. c. 109), s. 18, sums "which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Apart from the statute these moneys would have been recoverable as moneys of Waud in Cronmire's hands. They had been deposited to cover contingent debts which might become due from Waud in certain events; but those events had, before Cronmire's death, been determined in Waud's favour, and there was no ground for the further detention of the moneys by Cronmire. It was the intention of both parties that when the dealings were closed the depositor should retain his ownership of what should remain unappropriated. Then, does the statute prevent recovery? Apart from authority, I should have thought that the moneys so deposited by way of security were not within the language of the section "deposited to abide the event" on which the wagers were made. This was the view of the Court of Appeal and of the

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House of Lords in the first case of *Strachan* v. *Universal Stock Exchange, Limited* (1), in relation to a deposit of shares as "cover"; but in the second case of the same name (2) a deposit of money for a similar purpose was regarded in the Court of Appeal as made "to abide the event" within the meaning of the statute, and on that point I can see no distinction between that case and the present one; and I must, therefore, hold that the statute in that respect is applicable.

Then, what is the effect of the statute in such a case? The decisions have not been uniform, and perhaps none is precisely in point. In *Varney* v. *Hickman* (3), one of the first cases decided on this enactment, the plaintiff after depositing stakes with a stakeholder revoked his authority before the event had been decided, and after the event he sued for a return of the deposit, which had been paid over to the winner. Maule J. said: "The first branch of this section declares the contract to be null and void; the second prevents the winner from bringing an action to recover the amount of the bet from the loser; and the third prevents the winner from suing the stakeholder .... the third applying to the case of an action brought by the winner against the stakeholder for the entire sum deposited with him .... This cannot be considered as an action brought for recovering a sum of money alleged to be won upon a wager; nor do I think it is an action brought to recover a sum deposited in the hands of the defendant to abide the event of a wager. That must necessarily mean an action to be sustained on the ground of the existence and determination of the wager. Here, the money is not claimed on that ground. Quite the reverse. The plaintiff insists that the sum he seeks to recover, is money which belongs to him, and which the defendant has no right to keep, and which he is under no legal or moral obligation to pay to any one else." Cresswell J. said: "The third branch (of the section) clearly applies to the same description of persons as are mentioned in the second, namely, winners." On the other hand, in *Manning* v. *Purcell* (4) it was held by Knight

(1) [1895] 2 Q. B. 329; [1896] A. C. 166.
(2) [1895] 2 Q. B. 697.
(3) (1847) 5 C. B. 271.
(4) (1855) 7 D. M. & G. 55.

Bruce and Turner L.JJ. that where a party to a bet has made a deposit with the other, and the event has been decided in favour of the former, he cannot recover the deposit. The distinction, however, between an action to recover the plaintiff's own deposit, and an action to recover the joint stakes, was not suggested in that case. Both the Lords Justices, however, seem to have doubted *Varney* v. *Hickman*. (1)

In *Hampden* v. *Walsh* (2) Cockburn C.J. reviewed the previous cases, not, however, mentioning *Manning* v. *Purcell*. (3) The question was as to the plaintiff's right after the event to revoke the stakeholder's authority to pay. The judgment, after pointing out that a stakeholder is primarily the agent of the depositor rather than a trustee, discusses the meaning of the statute, and cites *Varney* v. *Hickman* (1) as deciding that the statute, so far as it refers to deposits, "was meant to apply only to the non-recovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over."

In *Diggle* v. *Higgs* (4) the same question came before the Court of Appeal, constituted of Lord Cairns L.C., Cockburn C.J., and Bramwell L.J., and *Hampden* v. *Walsh* (2) was approved on the ground that the section only prohibits actions upon the wagering contract itself for the money won, and does not affect any common law right to recover money paid upon the void contract. *Manning* v. *Purcell* (3) is not mentioned. Lord Cairns said—I quote from the report in the *Weekly Reporter* (5): "As I read the section, it amounts to this. It declares that all contracts by way of wagering and gaming shall be void. And then, dealing with actions upon those contracts which might otherwise be maintained, it declares that no court of law or equity shall entertain them; that is to say, the contract itself is null and void, and the particular parties to the contract shall not maintain any suit, either against his antagonist in the wager or against the stakeholder, to recover the money he says

(1) 5 C. B. 271.
(2) (1876) 1 Q. B. D. 189.
(3) 7 D. M. & G. 55.
(4) (1877) 2 Ex. D. 422; 25 W. R. 777; 46 L. J. (Ex.) 721.
(5) 25 W. R. 777.

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he has won. That makes the one member of the sentence correspond with the other. What consequences may follow, what legal right there may be to recover the money paid upon the contract declared void, the statute leaves unprovided for." This case was followed and approved in the Privy Council in *Trimble* v. *Hill.* (1)

These authorities seem to shew that the statute is to be construed as interfering only with an action brought on the contract to enforce the contractual claim for winnings on the wager. In the present case the cover was not in any natural sense won by Waud, nor was the present application brought on the wagering contract, or to enforce performance of it. On the old system of pleading, no reference to the contract need have been made in the declaration. If, indeed, the depositor had sued for the joint deposit as winner of the wager, that would have been a claim to enforce the contract, and he could not, in reply to a plea of the statute, have assigned his real claim to be for recovery of his own deposit; but that does not shew that he could not have sued to recover the deposit on particulars proper to the claim.

In the present case, if the money had been deposited with a stakeholder, it is clearly settled by the cases above cited that it could have been recovered at any time before it had been paid over. The authority to pay over could at any time be revoked, and it is revoked, by bringing an action (*Strachan's Case, No.* 1 (2)). The same enactment applies to both cases equally so far as it applies at all; and if it is no bar to recovery in the one case, it can hardly of itself be a bar in the other; and the obstacle to recovery, if there be one, must be found in the common law. There would have been such an obstacle by the common law if the events had been determined in Cronmire's favour, because the money being in his hands on the terms that it should become his on the event being so determined, and the event being supposed to have been so determined, title and possession would have been conjoined in him, and there would have been the equivalent of a voluntary and unconditional payment with knowledge of the facts, which is always a bar to

(1) (1879) 5 App. Cas. 342. (2) [1895] 2 Q. B. 329; [1896] A. C. 166.

recovery, even when payment has been made without any consideration. But as the facts are, no title had passed; nor, as has often been pointed out, is a wager such a "delict" as to admit the application of the rule "Potior est conditio possidentis," as applied in such cases as *Taylor* v. *Chester* (1); *Kearley* v. *Thomson* (2); or *Herman* v. *Jeuchner*. (3)

I should add that A. L. Smith L.J., in *Strachan's Case* (*No.* 2) (4), seems to have considered that the defendants there under similar circumstances were in the position of stakeholders. If that be so, there would be no doubt as to the claimant's right to recover in the present case. Then if that was the law before *Strachan's Case* (*No.* 2) (4), has that case altered it? The actual decision was entirely consonant with the former cases, and it does not seem even to have required any reference to the statute, for in that case the event had been determined in the defendant's favour, and the money had been actually appropriated by him, in accordance with the contract, in settlement of the differences, and so there had been in effect a payment voluntarily and unconditionally made with knowledge of the facts by the depositor. But although the decision raises no difficulty, a dictum attributed to one of the Lords Justices raises a difficulty. Lord Esher M.R. is reported as having said that money so deposited by one party with another can never be recovered unless the wager has been repudiated before the event of it has been determined. This opinion seems not to be in accordance with what is laid down in *Varney* v. *Hickman* (5), *Hampden* v. *Walsh* (6), and *Diggle* v. *Higgs* (7) (which does not appear to have been cited), and is opposed to the opinion of A. L. Smith L.J. In these circumstances it does not seem to me that the previous authorities are affected by *Strachan's Case* (*No.* 2). (4)

If this conclusion is well founded, it does not need the support of *Reggio* v. *Steven* (8), on which reliance was placed by the

(1) (1869) L. R. 4 Q. B. 309.
(2) (1890) 24 Q. B. D. 742.
(3) (1885) 15 Q. B. D. 561.
(4) [1895] 2 Q. B. 697.
(5) 5 C. B. 271.
(6) 1 Q. B. D. 189.
(7) 2 Ex. D. 422; 25 W. R. 777; 46 L. J. (Ex.) 721.
(8) (1888) 4 Times L. R. 326.

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counsel for the claimant. If it is not well founded, *Reggio* v. *Steven* (1) does not advance his case, for the cover was deposited, not (as here) in respect of each particular transaction, but generally, and that case decides no more than that a person who has deposited "cover" generally for future transactions can at any time decline to gamble further and recover the unexhausted deposit. As regards the contention that notice to Cronmire repudiating the wagering contract ought to have been given before these proceedings, or before the administration order, I have said that this point appears to be concluded against the trustee by *Strachan's Case* (*No.* 1). (2) Even if that decision is not applicable, it seems to me on principle that an action is a sufficient assertion of the depositor's right to recover, where the event has not been determined against him, or, at any rate, where, as here, it has been determined in his favour. Under the circumstances there will be no order as to costs.

Proof allowed.

H. L. F.

The trustee appealed.

April 29. *Robson, Q.C.*, and *Macaskie*, for the trustee. The balance of the gambling transactions was not recoverable, and there was therefore no consideration for the promise to deliver the stocks which the bankrupt was to have purchased with the balance. If it is said there is an account stated, that would only be evidence of payment; and the facts shew that there was no payment by the bankrupt to Waud, and then a repayment by him. The money in the bankrupt's hands never changed its character as the balance of money arising out of gambling transactions.

The cover was not deposited as security merely, but also to abide the event. If the stocks went down, the bankrupt was to retain sufficient to cover the depreciation. *Strachan* v. *Universal Stock Exchange* (*No.* 2) (3) and *Universal Stock Exchange* v. *Strachan* (2) do not apply. There was no repudiation

(1) 4 Times L. R. 326. (2) [1895] 2 Q. B. 329; [1896] A. C. 166.
(3) [1895] 2 Q. B. 697.

of the gaming transactions before action: *Gatty* v. *Field.* (1) The deposit is therefore not recoverable, and the proof for it is inadmissible.

H. Reed, Q.C., and *Israel Davis*, for Waud. So far as the deposit is concerned, the statute does not prevent its recovery, for the event had been determined, and, the balance being in favour of Waud, there was nothing to which the deposit could be appropriated. The case is covered by the authority of *Strachan* v. *Universal Stock Exchange* (*No.* 2). (2)

As to the balance on the gambling transactions, though the money which appeared on one side of the statement of account could not have been recovered, the statement of account itself is good.

There was good consideration for the promise to invest this money, and an action would lie for breach of that promise. The proof, therefore, ought to have been allowed.

[They cited *Laycock* v. *Pickles* (3); *Dawson* v. *Remnant* (4); *Cooper* v. *Parker.* (5)]

A. L. SMITH L.J. This is an appeal from a decision of Wright J. allowing an appeal by one A. E. Waud from the rejection by the trustee of Cronmire's estate of his proof against that estate, the ground of the rejection being that the claim arose on contracts which were gaming transactions.

It appears that Waud got into communication with Cronmire, who was an outside stockbroker, and made contracts with him which, although they purported to be sales and purchases of stocks and shares, were, except the two last, with which I will deal presently, gambling transactions. The result was that there was a sum of 375*l.* won by Waud in Cronmire's hands, which, apart from the Gaming Act, 1845, he was bound to pay over to Waud. Cronmire died, and his estate was administered under the bankruptcy jurisdiction of the High Court. Waud thereupon carried in his proof, alleging that the estate was

(1) (1846) 9 Q. B. 431; 15 L. J. (Q.B.) 408.
(2) [1895] 2 Q. B. 697.
(3) 4 B. & S. 497; 33 L. J. (Q.B.) 43.
(4) 6 Esp. 24.
(5) (1855) 15 C. B. 822; 24 L. J. (C.P.) 68

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indebted to him in the sum of 375*l.* The point taken by the trustee was that the claim arose on contracts which were gaming transactions, and an issue was directed to determine whether they were so. The two last transactions, which arose after the balance of 375*l.* had been struck, were directions by Waud to Cronmire to purchase Great Eastern Railway Stock and Dover "A" Stock. The jury found that all the transactions up to the last two were by way of gaming and wagering, but that the last two were intended to be bonâ fide purchases for investment, and were not made by way of gaming and wagering. Now, if any one could give a true account of these two transactions, it would be Waud himself, and he swore an affidavit which is intelligible and clear, and is in accordance with the evidence that he gave, shewing how the balance of 375*l.* due to him was dealt with. He says that he agreed with Cronmire that he should purchase for him the Great Eastern Stock, and that such stock should be taken by him in part payment of the balance due to him. The arrangement as to the Dover "A" Stock was a similar one; but as the price of this stock to be purchased slightly overtopped the remainder of the balance, the difference was to be made up by a money payment by Waud to Cronmire. It is clear, therefore, that these stocks were to be purchased with the balance which resulted from the gaming and wagering transactions so far as that balance would go.

It is said on behalf of the trustee that Waud cannot claim as he has done the 375*l.* balance, and that he cannot shape his case so as to get rid of the fact that the stocks were purchased with money the proceeds of the gambling transactions. An ingenious argument was addressed to Wright J. which induced him to disbelieve Waud's account of the matter; why he should have done so I do not know. It was argued that there had been a settlement of accounts between Waud and Cronmire which amounted to an account stated. In my opinion the authorities shew that while an account stated as to cross items may be evidence of payment, it is not conclusive, and if disputed the question is whether in fact it was taken by the parties to be so. In this case why should we treat this account as

payment when we have the oath of Waud to the contrary? It seems to me, therefore, that the learned judge was wrong in saying that it was payment, and that Waud could prove for the balance if he shaped his claim in the proper way. In my judgment, upon the true facts of the case, Waud cannot prove for the 375*l.* either as the balance due to him on his general account, or as damages for non-delivery of the stock, for there was no consideration for the promise by Cronmire to purchase the stock. I am of opinion, therefore, that the judgment on this part of the case should be reversed.

There is another point raised on the proof, as to a sum of about 60*l.* lodged by Waud as "cover." That expression is a well-known one, and it means that the money is deposited by the client to secure the broker from loss in the event of the stock falling in value. The law as to such a deposit was tersely put by Lord Herschell in *Universal Stock Exchange* v. *Strachan* (1) in these words: "It is said that although it may be a gambling contract, yet nevertheless the very provisions of the section against gaming and wagering prevent the plaintiff recovering the security which he deposited with the defendants, inasmuch as it is an 'article of value' deposited with them to 'abide the event' of a wager. That seems to me not to be the case. It was deposited as security against a debt which might arise from a gambling transaction. What the defendants are really seeking is to avail themselves of that security by virtue of a void contract, and it is impossible to say that that was an 'article of value' deposited with the defendants to abide the event of a wager." We have, then, the decision of the House of Lords affirming that of this Court. What I said in *Strachan* v. *Universal Stock Exchange* (*No.* 2.) (2) has been referred to; but, in my opinion, what I said does not apply to the present case, and I am prepared to abide by both the decisions. In this case we may leave gaming and wagering out of the question. It had come to an end, and the result is that Cronmire's estate has this 60*l.*, which Waud can demand on the ground that it has never been used or wanted to be used for the purpose for which it was deposited. No question arises

(1) [1896] A. C. 166, at p. 173. (2) [1895] 2 Q. B. 697.

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as to the appropriation of the money, because no necessity ever arose to utilize the money in that way. Waud is therefore entitled to prove in respect of the deposit, and the judgment of Wright J. on this part of the case should be affirmed.

CHITTY L.J. I am of the same opinion. A proof has been brought in against the estate of Cronmire. As to the purchase of stocks with the balance of the gambling account, the learned judge has thought it right on the arguments of Waud's counsel to set aside Waud's statement, which is a complete and reasonable version of the transaction, to the effect that he did not receive the balance and did not agree to take a promise to deliver the stocks, but did agree to accept the stocks themselves and had not received them, and so is still a creditor for the balance. That balance is undoubtedly the proceeds of gambling transactions, as is shewn by the verdict of the jury. It is unnecessary to say more on this point than that I agree that the judgment as to it should be reversed.

As to the amount deposited as cover it was plainly deposited as security to Cronmire against loss by the transactions between the parties. The case is covered by Lord Herschell's remarks that have been already quoted. This sum of money is free from the taint of gambling, and has never been used for the purpose for which it was deposited. The result is that the Gaming Act does not apply, and the value of the deposit is provable against the estate.

VAUGHAN WILLIAMS L.J. Having regard to a long series of decisions, it is impossible to contend that the provisions of the Gaming Act prevent the recovery of a deposit such as this, whether made with a stakeholder or with a party to the transaction. The result is that a person seeking to recover such a deposit is relegated to his common law rights. What are the common law rights of a person who has deposited money in respect of a gaming transaction? According to my view of the law, it is not true to say that a person who has done this is entitled at all times and for ever after to recover the money deposited. On the contrary, he is only entitled to do this so

long as the transaction is incomplete and the money has not been applied to the purpose for which it was deposited. The case is easily enough disposed of where the depositee is the winner of the event. There if there has been merely a deposit of each nothing more remains to be done, and the depositee having the money in his hands may appropriate it to the satisfaction of his winnings, and it is then too late for the depositor to seek to recover it. The case is not so clear when the event has determined in favour of the depositor, because one has to consider when it can be properly said that the transaction under which the money was deposited came to an end. It might be said that it never comes to an end till the amount of the deposit is returned, because it would always be true to say that the money has not been dealt with under a gaming contract and never can be, and therefore it is always open to the depositor to bring his action to recover it. I am not prepared to say whether I would go that length, but I do not think it necessary to-day to decide that, because the money was not a mere stake to pass from one to the other according as the event resulted, but was really security, the whole or part of which might have to remain with the depositee or be paid back in whole or part to the depositor. I understand from the evidence that the parties made no agreement as to how the deposit was to be dealt with in the circumstances that have arisen, so that nothing could be done till the parties had agreed how it should be dealt with. No such agreement was made, and the depositor, at a moment when the transaction was still executory, has elected to demand back his money and to go no further in the gambling transactions in respect of which it was deposited. That being so, I agree with the other members of the Court that the depositor was entitled to have back his money; and the result is that he can prove against the estate for the amount of the deposit.

Appeal allowed in part.

Solicitors for claimant: *Atkinson & Dresser.*
Solicitor for trustee: *H. H. Boorne.*

A. M.

C. A.
1898
June 17.

[IN THE COURT OF APPEAL.]

SEA INSURANCE COMPANY *v.* BLOGG.

Insurance (Marine)—Attachment of Risk—Ships "sailing" on or after a Specified Date.

In an action on a policy of marine insurance on goods in ships "sailing on or after March 1," it appeared that the ship in question had finished loading her cargo before ten o'clock at night on February 29, and, having previously cleared the Custom House, was then ready to proceed to sea; but by a regulation of the port ships were not permitted to go out to sea after dark. At ten o'clock the master, with the object of keeping his crew on board so as to be ready to start early in the morning, moved the ship away from the wharf about five hundred yards out into the river and there anchored. In so moving the ship, he placed her in a slightly more advantageous position for starting than she would have been in if she had remained at the wharf, but the gaining of that advantage was no part of the master's motive in moving her. On the following morning, March 1, she proceeded on her voyage:—

Held (affirming the judgment of Mathew J.), that the ship sailed on March 1, and not on February 29, and that the policy attached.

Appeal from the judgment of Mathew J. (1) at the trial before him without a jury.

The action was upon a policy of reinsurance, by which the plaintiffs were insured by the defendant and other underwriters at and from ports in the United States to ports in Europe, on goods per "steamers as attached sailing on or after March 1, 1896." Amongst the declarations attached to the policy was one for 3000*l.* on flour per SS. *Massacoit* on a voyage from Newport News, James River, Virginia, to London. The *Massacoit* completed her loading at the wharf at Newport News between nine and ten o'clock at night on February 29, 1896, and, having previously cleared the Custom House, she was then ready to proceed to sea. Pilotage is compulsory upon foreign-going vessels in the James River, and by the pilotage regulations such vessels are not permitted to go to sea after dark owing to the difficulties of navigation and the absence of

(1) [1898] 1 Q. B. 27.

lights in the river. At ten o'clock the master moved the vessel out from the wharf about five hundred yards into the stream, and there anchored until the morning. Vessels can leave the wharf at any time in the morning after daybreak, and one starting from her anchorage in the stream would have at the most half-an-hour's advantage in reaching the river mouth over one starting from the wharf side. There was evidence to the effect that the object of the master in moving the vessel out into the stream was to keep his crew together, and to prevent them from going ashore and getting drunk, and that the gaining of the slight advantage above mentioned was no part of his motive in so doing. On the following morning, March 1, about eight o'clock, the ship weighed anchor, and proceeded to sea. She was subsequently lost in the course of her voyage. The defendant contended that the loss was not covered by the policy. The learned judge held that the vessel did not sail until March 1, and that the loss was consequently covered by the policy. He therefore gave judgment for the plaintiffs.

Pickford, Q.C., and *Scrutton*, for the defendant.

Joseph Walton, Q.C., and *Carver, Q.C.*, for the plaintiffs.

The arguments were in substance to the same effect as in the Court below and the same authorities were cited.

A. L. SMITH L.J. The question raised by this appeal is whether a loss was covered by a policy of reinsurance effected by the plaintiffs with the defendant and other underwriters. Having regard to the terms of the policy, that question depends on whether the ship sailed on the last day of February or on the first day of March. The learned judge in the Court below has found that she sailed on March 1, and not on the last day of February. The authorities which have been cited, such as *Cockrane* v. *Fisher* (1), shew that the question whether a ship has sailed in such a case depends on the intention with which she was moved from the quay or other place at which she had been loading her cargo. The learned judge below stated that to be the law on the subject, and I think what he said in that

(1) (1835) 1 C. M. & R. 809.

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respect is well founded. Then comes the question whether the evidence in this case shews that, when the ship was moved from the quay out into the stream on February 29, it was the intention of the captain that she should sail on her voyage that night. I think that the evidence is conclusive that it was not the intention that the ship should sail when she was moved from the quay that night, but the intention merely was that she should move out into the stream for the night, and should not start on her voyage till the next morning. She was only moved a short distance, namely about 500 yards, from the wharf in order that the crew might not be able to go ashore and get drunk, and there was no intention of then commencing the voyage. It was suggested by the defendant's counsel that the ship was moved that distance from the quay in prosecution of the voyage; that the intention of the captain was to perform that portion of the voyage that night, and to proceed with the remainder the next morning. No doubt a ship may be moved from the quay with the intention of performing a small portion only of the voyage on that day, and proceeding on the next day with the remainder of the voyage. But the evidence shews that that was not the intention in the present case. I think that the learned judge was right in arriving at the conclusion that under the circumstances which existed the ship did not sail until March 1; and therefore this appeal must be dismissed.

RIGBY L.J. I agree. The authorities shew that, in order to determine the question when the ship must be considered to have sailed, it is necessary to look to the real intention of the captain or person in command of her. If the intention in moving her from the wharf where she had been loaded was to perform not merely a nominal but a substantial portion of the voyage, as in the case of *The City of Cambridge* (1), where the ship was taken down the river and anchored so as to be able to cross the bar in the morning, then no doubt the ship must be considered as having sailed when she left the wharf. But I agree that in the present case the evidence shews that there was no such intention.

(1) (1874) L. R. 5 P. C. 451.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I think that the intention with which the ship was moved from the wharf where she had been loading ought to be deduced as far as possible from the facts of the case rather than from what may have been stated in evidence afterwards as having been the intention in moving her. If a ship being perfectly ready to start, having completed her loading and having all her crew on board, leaves the wharf where she has been loading, and proceeds ever so short a distance upon her voyage, and then some physical reason prevents her proceeding further, I think that the proper inference in such a case would generally be that she sailed within the meaning of the word "sail" as used in policies of marine insurance. But I agree that the sailing must be a sailing which is a commencement of the voyage; and, therefore, if a ship, when she leaves the wharf, is not ready for the voyage by reason of not having all her crew on board or some other reason, that may be evidence that she did not then commence her voyage. It seems to me that in the present case the inference which primâ facie might arise from the condition of the ship when she left the wharf to the effect that she then commenced her voyage, and only stayed where she did in the river for the night by reason of the pilotage regulations, is negatived by the evidence of other circumstances in the case which shews that the object of moving the ship from the wharf was to prevent communication with the shore during the night, and thus accounts for the ship being so moved independently of any intention to commence the voyage. I think that this evidence justified the inference drawn by the learned judge to the effect that the ship did not sail until March 1, 1896.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes & Rawle.*
Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

E. L.

Considered. BIDDLE v. TRUVOX ENGINEERING CO. LD. [1952] 1 K.B. 101

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June 27, 28.

[IN THE COURT OF APPEAL.]

GROVES *v.* WIMBORNE (LORD).

Statutory Duty—Action on Statute—Factory—Neglect to fence Machinery—Penalty—Master and Servant—Common Employment—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 5, *sub-s.* 4; *ss.* 81, 82, 86, 87.

An action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed upon him by s. 5, sub-s. 4, of the Factory and Workshop Act, 1878.

The defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection.

APPEAL from the judgment of Grantham J. at the trial before him with a jury.

The action was to recover damages for an alleged breach by the defendant of the statutory duty imposed upon him by s. 5 of the Factory and Workshop Act, 1878, in allowing certain dangerous machinery to be and remain unfenced, whereby personal injury had been occasioned to the plaintiff.

The plaintiff was a boy employed in the service of the defendant at the Dowlais Iron Works of which the defendant was the proprietor. Amongst the machinery in the works was a steam winch with revolving cog-wheels, at which the plaintiff was employed. These cog-wheels were dangerous to a person working the winch unless fenced. There was evidence that there had originally been a guard or fence to these cog-wheels, but it had for some reason been removed, and there had been no fence to the wheels while the plaintiff was employed at the winch, a period of about six months. While the plaintiff was so employed, his right arm had been caught by the cog-wheels, and was so much injured that the forearm had to be amputated. The learned judge held that an action would not lie for breach of the statutory duty imposed by the Factory and Workshop Act, 1878, s. 5, but he asked the jury to assess the damages

provisionally, which they did at the sum of 150*l*. The judge entered judgment for the defendant.

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Abel Thomas, Q.C., and *S. T. Evans*, for the plaintiff. It was the duty of the defendant under s. 5 of the Factory and Workshop Act, 1878, as amended by the Factory and Workshop Act, 1891, s. 6, to maintain the fencing of this machinery, which was admittedly dangerous. This duty was not performed, and the plaintiff was in consequence injured. Primâ facie an action lies for a breach of a statutory duty imposed for the benefit or protection of a particular class of persons by which one of such persons is injured. In some cases, no doubt, where a statute creating a duty gives a particular remedy for a breach of it, that remedy is the only remedy, and an action will not lie; but the question whether that is so must depend on the general purview of the statute: see per Lord Cairns L.C. in *Atkinson* v. *Newcastle Waterworks Co.* (1), and per Lord Herschell in *Cowley* v. *Newmarket Local Board.* (2) In some cases where the duty imposed is towards the public at large, and not a particular class of persons, such as the duty of providing a public water supply, or of keeping highways in repair, particularly where a penalty is provided by the Act for breach of that duty, it may be clear from the general purview of the Act that it was not intended that an action should lie at the suit of individuals for neglect to comply with its provisions. The before-mentioned cases and the case of *Saunders* v. *Holborn District Board* (3) were of that description. But, where the duty is imposed by the Act for the benefit or protection of a particular class of persons, and a remedy given by the Act, such as a penalty, would be an inadequate remedy for injuries occasioned to such a person by neglect to comply with its provisions, there the presumption is that the Legislature did not intend that the statutory remedy should be exclusive of a right of action. See per Kelly C.B. in *Gorris* v. *Scott* (4) and *Ross* v. *Rugge-Price.* (5) It seems to have been assumed in

(1) (1877) 2 Ex. D. 441, at p. 448.
(2) [1892] A. C. 345, at p. 352.
(3) [1895] 1 Q. B. 64.
(4) (1874) L. R. 9 Ex. 125.
(5) (1876) 1 Ex. D. 269.

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many cases with regard to the Factory Act of 1844, the provisions of which were very similar to those of the present Act, that the provisions as to penalties for breach of the duty to fence did not take away the right of action. See *Coe* v. *Platt* (1); *Caswell* v. *Worth* (2); *Doel* v. *Sheppard* (3); *Holmes* v. *Clarke*. (4) The case of *Britton* v. *Great Western Cotton Co.* (5) is an authority to the effect that such an action as this will lie. See also the Scottish case of *Kelly* v. *Glebe Sugar Co.* (6)

It cannot have been intended that the penalty provided by s. 82 of the Factory and Workshop Act, 1878, should be the only remedy for a breach of the statutory duty to fence dangerous machinery, because that penalty does not necessarily go to the person injured or his family, and the amount of the penalty would be regulated by the gravity of the particular offence, not by the amount of injury occasioned.

The doctrine "Volenti non fit injuria" has no application to a case of a breach of a statutory duty: *Baddeley* v. *Granville* (*Earl*). (7) The action is here based on failure to perform the statutory duty, not on any negligence of the defendant through a fellow-servant of the plaintiff, and therefore the doctrine of common employment can have no application.

[They also cited *Couch* v. *Steel* (8); *Paterson* v. *Wallace*. (9)]

B. F. Williams, *Q.C.*, and *Bailhache*, for the defendant. It is submitted that it sufficiently appears from the purview of the Act that the remedy by way of penalty under s. 82 was intended to be the sole remedy for a breach of its provisions, and that it was not intended that an action should lie for non-compliance with them. The duty to fence machinery is the creature of the statute; and the Act which creates it itself provides a remedy in a case where a person is injured by a breach of its provisions, because by s. 82 the Secretary of State may

(1) (1851) 6 Ex. 752; (1852) 7 Ex. 460, 923.
(2) (1856) 5 E. & B. 849.
(3) (1856) 5 E. & B. 856.
(4) (1861) 6 H. & N. 349; (1862) 7 H. & N. 937.
(5) (1872) L. R. 7 Ex. 130.
(6) (1893) 20 R. 833.
(7) (1887) 19 Q. B. D. 423.
(8) (1854) 3 E. & B. 402.
(9) (1854) 1 Macq. 748.

direct that the penalty or part of it shall be applied for the benefit of the person injured or his family. This provision would not have been inserted, if it were intended that an action should lie. The cases referred to by the plaintiff's counsel with regard to the non-fencing of machinery were, with the exception of *Britton* v. *Great Western Cotton Co.* (1), cases where the absence of fencing and consequent danger had been brought to the knowledge of the employer, and so there was evidence of negligence on his part for which an action might lie, and therefore they were not cases where the action was brought merely as for breach of an absolute statutory duty. In *Britton* v. *Great Western Cotton Co.* (1) the action was for not having provided fencing as required by the Factory Act of 1844 in the first instance. In the present case the evidence was that there had been fencing provided in the first instance, but that it had been removed. Its removal and the fact that it was not replaced would be through the negligence of some fellow-servant of the plaintiff, in respect of which the defendant would not be liable. The statute may impose an absolute statutory duty on the occupier of a factory to provide proper fencing in the first instance, for that is a matter which he may reasonably be expected to see to; but it cannot have imposed an absolute statutory duty on him to see that the fencing is always kept in situ, for that would be unreasonable. With regard to that he may delegate his duty to a competent servant, and there is no case which shews that, where he has provided proper fencing in the first instance, he can be sued for the wrongful act or negligence of the injured person's fellow-servant in removing and failing to replace the fencing. It has never been suggested heretofore that the provisions of the Factory Acts abolished the doctrine of common employment with regard to cases coming within them. In *Howells* v. *Landore Steel Co.* (2) it seems to have been assumed with regard to the Coal Mines Regulations Act, 1872, which may be treated for this purpose as being in pari materiâ with the Factory Acts, that an action for breach of the provisions of the Act must be based on negligence, and it was held that the plaintiff could not recover for injuries

(1) L. R. 7 Ex. 130. (2) (1874) L. R. 10 Q. B. 62.

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sustained through the negligence of a certificated manager as being negligence of his fellow-servant. *Wilson* v. *Merry* (1) shews that the defence of common employment is applicable to an action for breach of a statutory duty.

[They also cited on this point *Priestley* v. *Fowler* (2), and *Bartonshill Coal Co.* v. *Reid* (3); *Senior* v. *Ward.* (4)]

Abel Thomas, Q.C., for the plaintiff, was not called upon to reply.

A. L. SMITH L.J. In this case the plaintiff sues the defendant, who is the occupier of the Dowlais Iron Works, for breach of a duty to fence certain machinery imposed upon him as such occupier by the Factory and Workshop Act, 1878, by reason of which breach of duty the plaintiff sustained personal injuries. The learned judge at the trial gave judgment for the defendant, being of opinion that no action lay for the breach of duty alleged by the plaintiff. The Act in question, which followed numerous other Acts in pari materiâ, is not in the nature of a private legislative bargain between employers and workmen, as the learned judge seemed to think, but is a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit. The first question is what duty is imposed by that Act upon the occupiers of factories and workshops with regard to the fencing of machinery. By s. 5 it is enacted that "with respect to the fencing of machinery the following provisions shall have effect." Then by sub-s. 3 of the section, as amended by the Factory and Workshop Act, 1891, s. 6, sub-s. 2, "All dangerous parts of the machinery, and every part of the mill gearing shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced"; and by sub-s. 4, "All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process"; and "a factory

(1) (1868) L. R. 1 H. L., Sc. 326.
(2) (1837) 3 M. & W. 1.
(3) (1858) 3 Macq. 266.
(4) (1859) 1 E. & E. 385.

in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act." In the present case it is admitted that machinery on the defendant's premises which came within these provisions was not fenced as required by the Act, and that injury was thereby occasioned to the plaintiff, a boy employed on the works. On proof of a breach of this statutory duty imposed on the defendant, and injury resulting to the plaintiff therefrom, primâ facie the plaintiff has a good cause of action. I leave out of the question for a moment the provisions of ss. 81, 82, and 86 of the Act. Could it be doubted that, if s. 5 stood alone, and no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole "purview" of the Act, to use the language of Lord Cairns in the case of *Atkinson* v. *Newcastle Waterworks Co.* (1), that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine imposed by s. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established. The question therefore is whether the cause of action which primâ facie is given by s. 5 is taken away by any provisions to be found in the remainder of the Act. It is said that the provisions of ss. 81, 82, and 86 have that effect, and that it appears thereby that the purview of the Act is that the only remedy, where a workman has been injured by a breach of the duty imposed by s. 5, shall be by proceeding before a court of summary jurisdiction for a fine under s. 82, which fine is not to exceed 100*l.* In dealing with the question whether this was the intention of the Legislature, it is material, as Kelly C.B. pointed out in giving judgment in the case of *Gorris* v. *Scott* (2), to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons. The Act now in question, as I have said, was clearly passed in favour of workers employed in

(1) 2 Ex. D. 441. (2) L. R. 9 Ex. 125.

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factories and workshops, and to compel their employers to perform certain statutory duties for their protection and benefit. It is to be observed in the first place that under the provisions of s. 82 not a penny of the fine necessarily goes to the person injured or his family. The provision is only that the whole or any part of it may be applied for the benefit of the injured person or his family, or otherwise, as a secretary of state determines. Again, if proceedings for the fine are taken before magistrates, upon what considerations are they to act in determining the amount of the fine? One matter to be considered clearly would be the character of the neglect to fence. This neglect might be either of a serious or of a venial character. Suppose that it was of the latter character, but a person was unfortunately killed or injured in consequence of it. What fine are the magistrates to impose? Are they to impose a fine of the same amount as if it were a flagrant case of neglect to fence? The first thing one would say that they would have to consider would be whether the offence was of a grave character or otherwise. It may be said that in determining the amount of the fine the character of the injury sustained by the workman would be considered, but I am not sure that that is the meaning of the section. It seems to me that the fine is inflicted by way of punishment of the employer for neglect of the duty imposed by the Act, and must be proportionate to the character of the offence. This consideration and the fact that whatever penalty the magistrates inflict does not necessarily go to the injured workman or his family lead me to the conclusion that it cannot have been the intention of the Legislature that the provision which imposes upon the employer a fine as a punishment for neglect of his statutory duty should take away the primâ facie right of the workman to be fully compensated for injury occasioned to him by that neglect. Another observation which makes the matter still clearer arises from the fact that, having regard to the provisions of s. 87, it may not be the employer, presumably a person of means and capable of paying a substantial fine, who would have to pay the fine. Under that section the employer may be exempted from the penalty, and the fine may be imposed upon the actual offender, who may be a work-

man employed at weekly wages; and yet it is said that a fine payable by such a person is the only remedy given by the statute to the injured workman for breach by the occupier of the imperative statutory duty. I cannot read this statute in the manner in which it is sought to be read by the defendant. I think that s. 5 does give to the workman a right of action upon the statute for injury caused by a breach of the statutory duty thereby imposed, and that he is not relegated to the provisions for the imposition of a fine on the employer, or it may be a workman, as his sole remedy.

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A great many cases have been cited, but none of them shew that for injuries occasioned by a breach of the statutory duty to fence machinery imposed, in the first instance, by the earlier Factory Act of 1844, and subsequently by the Factory and Workshop Act of 1878, an action will not lie. On the other hand, two cases were cited for the plaintiff which go far to shew that the defendant's contention is unsound. One of these cases is *Britton* v. *Great Western Cotton Co.* (1), which covers the present case with the exception that there the breach of statutory duty complained of was not providing a fence in the first instance, whereas in the present case it is not maintaining the fence. But I see no substantial difference in that respect between the two cases. The occupier would be liable under s. 82 either for not providing a fence or for not maintaining it, and, though *Britton* v. *Great Western Cotton Co.* (1) shews that in the former case an action would lie, it is argued that in the latter it would not. I cannot see any sense in that. It seems to me that that case goes nine-tenths of, if not all, the way to the establishment of the plaintiff's cause of action. Then there is the case of *Kelly* v. *Glebe Sugar Co.* (2) in Scotland, which, no doubt, is not binding on us, but which is directly in point in the plaintiff's favour. I am of opinion that, upon the true construction of the statute and on the authorities, the plaintiff has made out a good cause of action under the statute.

But another point was taken for the defendant. It was said that the doctrine of common employment afforded a defence to the action. The general doctrine of law is that the master is

(1) L. R. 7 Ex. 130. (2) 20 R. 833.

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responsible for the negligent act of his servant, acting within the scope of his employment, which occasions injury to a third person; but the case of *Priestley* v. *Fowler* (1) imposed a limitation on this doctrine in favour of the master. It was decided in that case that the master is not responsible in respect of injuries occasioned to his servant by the negligence of a fellow-servant, and the ground of that exception from the general law is that the servant, when contracting with the master, is supposed to undertake the risk of injury to himself by the negligence of his fellow-servant. But in my judgment the defence of common employment only applies where the action is by a servant against the master and is founded upon the negligence or misconduct of his fellow-servant. In such a case the doctrine of common employment attaches. In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant or of any one else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person. The case of *Wilson* v. *Merry* (2) was relied upon as shewing the contrary. But that case decided nothing of the kind. It simply decided that the law of Scotland with regard to the applicability of the doctrine of common employment where the fellow-servant was in a position of superintendence was the same as that of England. Lord Chelmsford, no doubt, went further, and expressed an opinion that the defence of common employment was open in such a case, notwithstanding the statutory duty. With great respect, I cannot agree with what he said on that point. It was only a dictum, and the other learned Law Lords expressed no such opinion. I think the doctrine of common employment has no application to this case.

For these reasons I am of opinion that the appeal should be allowed, and judgment entered for the plaintiff for the amount of the damages assessed by the jury.

(1) 3 M. & W. 1. (2) L. R. 1 H. L., Sc. 326.

RIGBY L.J. I agree. I think that substantially the only question to be decided is the question as to the true construction of the Factory and Workshop Act, 1878—that is to say, whether, having regard to the whole purview of that Act, the clauses which provide a penalty for a breach of its provisions are intended to give the only remedy for such a breach. Sect. 5 of the Act imposes on the occupier of a factory or workshop an absolute, unqualified duty to fence dangerous machinery. He is not only to provide a fence for the protection of the workmen in the first instance, but he is to maintain that protection. Where a duty of this kind is cast upon a person, he cannot be heard to say that he has delegated the performance of it to some other person, and that the failure to perform it arose through the negligence of that other person. It has long been settled law that, where some business is being done on behalf of a man by his servant, as, for instance, the driving of his carriage by his coachman, and in the performance of it a third person is injured by the negligence of that servant, he cannot plead that the injury was occasioned not by his fault but by the fault of his servant. The servant is often not a responsible person. The master is liable because it was his business that was being done, and, that being so, he cannot escape liability by delegating the performance of it to a servant, however careful he may have been to select a competent person. The case of *Priestley* v. *Fowler* (1) established an exception to this rule, the propriety of which exception has been sometimes doubted, but which is no doubt well-settled law, to the effect that, when a servant enters into an employment in which other servants are concerned in various capacities, he is assumed to make a bargain with the master that he will not look to the master in respect of damage occasioned to him by the act of a fellow-servant in the course of their common employment. The case of *Wilson* v. *Merry* (2), on which reliance was placed by the defendant's counsel, only decided that the view which had been taken by judges in Scotland that the doctrine of common employment did not apply where the injury had been caused by the negligence of a fellow-servant entrusted with

(1) 3 M. & W. 1. (2) L. R. 1 H. L., Sc. 326.

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superintendence over other servants, such as a foreman, was wrong, and that the law of Scotland was the same in that respect as that of England. Three of the Law Lords in giving judgment said that they would not express any opinion with regard to the question whether the respondents were liable as for a breach of an absolute statutory duty, as that question did not arise on the exception to the judge's ruling. Lord Chelmsford, however, thought it desirable to make some observations with regard to the case of a breach of statutory duty, though it was not before him. He referred to the decision of the Exchequer Chamber in the case of *Gray* v. *Pullen* (1), a decision of great authority, in which the Court held that, where a person upon whom a statutory duty was imposed employed an independent contractor, who failed to perform that duty, it did not make any difference that he had employed a contractor to do it and not his own servant, and he was responsible for damage resulting from its non-performance. The learned Law Lord went out of his way to suggest that that decision was wrong—that is to say, that a person upon whom a statutory duty is imposed can get rid of his liability by not employing his servant to do the work, but employing an independent contractor. The suggestion so made certainly does not embody the result of the modern law on the subject. In *Hardaker* v. *Idle District Council* (2) the present Master of the Rolls, referring to this dictum of the learned Law Lord, said: "Lord Chelmsford in *Wilson* v. *Merry* (3) expressed some doubt as to the correctness of this decision (*Gray* v. *Pullen* (1)); but I cannot find that it has ever been overruled or considered unsatisfactory by any other judge"; and the Court of Appeal proceeded to apply the law laid down in *Gray* v. *Pullen* (1) to the case before them. I think it must be taken upon the decisions that the dictum of Lord Chelmsford in *Wilson* v. *Merry* (3) is of no authority. Where an absolute duty is imposed upon a person by statute it is not necessary, in order to make him liable for breach of that duty, to shew negligence. Whether there be negligence or not, he is responsible quâcunque viâ for non-performance of the

(1) (1864) 5 B. & S. 970. (2) [1896] 1 Q. B. 335.
(3) L. R. 1 H. L., Sc. 326.

duty. As authority for that the case of *Gray* v. *Pullen* (1) may be referred to, where it was held in the Exchequer Chamber by the whole Court that the breach of a statutory duty such as that now in question of itself gives a right of action to a person thereby injured, unless the case can be brought within some known exception to that rule. An exception to the rule is where, a new duty or right being created by statute, a new remedy is given by the statute to a person injured by a violation of it, and upon the purview of the whole Act it appears that the remedy so given is intended to be a substitute for the right of action which would otherwise exist. Where negligence is essential to a cause of action, and the plaintiff seeks to prove it by shewing negligence, not of the master personally, but of some one employed by him, it may be that in a proper case the cause of action so set up may be met by the defence of common employment. If it is incumbent on the plaintiff to prove negligence on the master's part that doctrine may apply. But the cause of action relied on in the present case has nothing to do with negligence. The Dowlais Iron Works are of a very extensive nature, and of course Lord Wimborne does not and cannot give personal attention to all the details connected with them, and would probably know nothing about either the original fencing of this machinery or the maintenance of that fencing. I can see no substance in the suggested distinction between the two, or in the contention that he might be liable because the foreman employed by him never put up any fencing, but could not be liable because the foreman did not maintain fencing once put up. There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of any one in order to make out his cause of action. That being so, the doctrine of common employment is out of the question.

The only question that really arises is upon the construction of the Act itself. Looking at the whole purview of the Act, is it one of those Acts by which the Legislature renders a particular course of conduct imperative, and a deviation from it punishable by penalty, in the general interests of the public at

(1) 5 B. & S. 970.

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large, but does not intend that an individual shall have a private right of action for injury occasioned to him by breach of its provisions; or is it one of those Acts in which the Legislature, having created a new duty in the interests of a certain class of persons, and having provided a statutory remedy for breach of that duty, intends that that remedy shall be the only one available? It is in my opinion neither one nor the other. The provisions of s. 5 are intended for the protection from injury of a particular class of persons, who come within the mischief of the Act. The plaintiff is one of those persons, the possibility of injury to whom through neglect to fence machinery the section contemplates. That being so, the only question seems to be whether the provisions of the Act with regard to the imposition of fines for neglect of the duty created by the section reasonably lead to the conclusion that the Legislature intended that such fines should be the only remedy for breach of that duty. I think that, when those provisions are examined, it is impossible to arrive at that conclusion. The maximum fine that can be imposed in any case, however serious the injury caused may be, is one of 100*l*. It seems monstrous to suppose that it was intended that in the case of death or severe mutilation arising through a breach of the statutory duty, the compensation to the workman or his family should never exceed 100*l*. Again, s. 82 does not provide that the fine imposed under it shall necessarily go to the workman if he be injured, or to his family if he be killed; but only that the Secretary of State may, if he thinks fit, order that the fine or part of it shall do so. Again, a very slight injury may be occasioned to a workman by a very gross and wilful neglect of the duty imposed by s. 5. In such a case it would not be right for the magistrates to inflict a slight penalty, such as 5*l*., because the injury caused was trivial. If they considered that there had been a deliberate evasion or neglect of the provisions of the Act, it might be right for them to inflict the full penalty of 100*l*. But, on the other hand, there may be a case in which the injury to a workman is grievous, but the offence is comparatively venial. Must the magistrates in such a case inflict a heavy fine on the occupier of the factory, who may have been

shewn to be anxious to perform his duty under the Act, because by some slight oversight in a particular case he may have failed to do so? It seems to me that there may be cases in which they would be entitled to say that the offence was slight, though unfortunately it had caused serious injury to the workman, and therefore only a small fine ought to be imposed; and in such a case the maximum amount that the workman injured could obtain by way of compensation under s. 82 would be that small fine. Again, under s. 87 the occupier may be able to shew that he has used due diligence, and that the failure to comply with the Act was due to the default of some other person, and so escape liability to a fine, and throw the responsibility on that other person. In such a case the semblance of compensation given by the earlier section might be reduced to a mere shadow, a right to recover a penalty from a workman who would be unable to pay it. Looking at the purview of the whole Act, I cannot think it reasonable to suppose that the Legislature intended the penalty imposed by s. 82 to be the only remedy for injury occasioned by breach of the absolute statutory duty created by the Act. For these reasons I think judgment should be entered for the plaintiff for the damages assessed by the jury.

VAUGHAN WILLIAMS L.J. I am of the same opinion. In the result I entertain no doubt that upon the proper construction of the Factory and Workshop Act, 1878, the Legislature did not intend the remedy or benefit which may be given under s. 82 through the intervention of the Secretary of State to a person injured through a breach of the provisions of the Act with regard to fencing machinery to be the only remedy open to a person so injured. I have also no doubt that the doctrine of common employment affords no defence to this action.

With regard to the first point it cannot be doubted that, where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, primâ facie, and, if there be nothing to the contrary, an action by the person so

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injured will lie against the person who has so failed to perform the duty. I have equally no doubt that, where in a statute of this kind a remedy is provided in cases of non-performance of the statutory duty, that is a matter to be taken into consideration for the purpose of determining whether an action will lie for injury caused by non-performance of that duty, or whether the Legislature intended that there should be no other remedy than the statutory remedy; but it is by no means conclusive or the only matter to be taken into consideration for that purpose. If it be found that the remedy so provided by the statute is to enure for the benefit of the person injured by the breach of the statutory duty, that is an additional matter which ought to be taken into consideration in dealing with the question whether the Legislature intended the statutory remedy to be the only remedy. But again, the fact that the Legislature has provided that that remedy shall enure, or under some circumstances shall enure, for the benefit of the person injured, is not conclusive of the question, and, although it may be a cogent and weighty consideration, other matters also have to be considered. In such a case as this one must, as Lord Cairns said in *Atkinson* v. *Newcastle Waterworks Co.* (1), look at the general scope of the Act and the nature of the statutory duty; and in addition one must look at the nature of the injuries likely to arise from a breach of that duty, the amount of the penalty imposed for a breach of it, and the kind of person upon whom it is imposed, before one can come to a proper conclusion as to whether the Legislature intended the statutory remedy to be the only remedy for breach of the statutory duty. I can add nothing to the observations of my brother A. L. Smith with regard to the provisions of s. 87, which in certain cases substitute a fellow-servant for the occupier of the factory as the person upon whom the penalty is to be imposed, or to the observations of my brother Rigby as to the improbability of the Legislature having intended that the 100*l.* fine should be the only remedy for a breach of duty which might lead to the death or serious injury of a person of the class intended to be benefited or protected by the Act. I entirely agree in the

(1) 2 Ex. D. 441.

conclusion that upon the true construction of the Act the penalty provided by s. 82 is not intended to be the only remedy for breach of the statutory duty created by the Act. But, although in the result I arrive at this conclusion without any doubt, I think that the question raised at the trial was one which at first sight was by no means free from difficulty. So far as I am aware, there is no instance up to the present time in which it has been held that, where a statute in terms provides that a penalty imposed by the Act shall go to the person injured by breach of the statutory duty, there is a civil remedy by action besides the statutory remedy. We have not, however, to decide that point, because s. 82 does not say that the penalty shall go to the person injured, or give him or any person power to recover it. All it does is to enable the Secretary of State, if he thinks fit under the circumstances of the case, to say that the penalty imposed or part of it shall be applied for the benefit of the person injured. In making these observations on the particular case I do not wish to be considered as going back in the slightest degree from the general proposition that no hard and fast line can be drawn as to what provisions in an Act will indicate that the intention of the Legislature was that the remedy provided by the statute should be the only remedy. In each case one must look at the whole of the statute, and gather from all its provisions the answer to the question whether that was the intention. This view of the matter is very clearly laid down by Stephen and Mathew JJ. in the case of *Vallance* v. *Falle*. (1)

Having said this much on the first point, I wish to add a few words on the second, namely, as to the nature of the defence of common employment and its applicability to a case like the present. I do not think that the defence of common employment goes to the question of negligence. It does not operate by way of negativing the existence of negligence by the master through his servant. It is a defence, as it appears to me, because it is an answer to the claim for damages by the particular plaintiff. I do not care whether the view of Lord Abinger C.B. in *Priestley* v. *Fowler* (2) be taken, and the defence

(1) (1884) 13 Q. B. D. 109.

(2) 3 M. & W. 1.

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be based on the maxim "Volenti non fit injuria," or the view expressed in later cases be taken, and the defence based on an implied contract between the master and servant that the latter will take the risk of an injury caused by the negligence of a fellow-servant. In either case the defence seems to me to be a defence because it is an answer to a claim for damages by the servant and for no other reason. What one has to consider in the present case, therefore, is whether the defence of common employment can be set up by the defendant here as an answer to this plaintiff's claim for damages. In my opinion it cannot for the following reasons. By s. 5, sub-s. 4, of the Act a duty is imposed upon the master to constantly maintain the fencing which by the previous part of the section it is made his duty to provide: and I agree that that is an absolute duty, and that it is no answer to an allegation against the master of failure to perform that duty for him to say that he employed a careful and skilful person as his substitute, and the breach of duty was not his fault but that of the person so employed. But, although I entirely agree in that, I wish to guard myself against being supposed to hold that, where there is an absolute statutory duty, the defence of common employment can never under any circumstances be set up. I agree that in the present case it cannot be set up, because on the facts it cannot be said that the injury to the plaintiff was caused by any negligence of a fellow-servant. The injury to the plaintiff in this case was one that was caused by the failure of the master to perform his statutory duty. But, suppose a case in which the master has provided the most perfect and efficient fencing for the machinery that could be, but some person on a particular occasion deliberately leaves the fencing off, or removes it. An obvious answer to an action against the master in such a case would be that the cause of the damage to the plaintiff was not the failure by the master to perform his statutory duty, but the particular action of some one else. I am not satisfied that, if it could be shewn that it was a fellow-servant of the person injured whose conduct in so dealing with the fencing was the cause of the injury to the plaintiff, the defence of common employment would not apply. Again, I should wish to add one more obser-

vation in order that my decision on this point may not be misunderstood. No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would not be an answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty. It would be an answer for the reason that in fact the damage to the plaintiff would not be caused by the failure of the master to perform the absolute statutory duty, because it would not have happened but for that and something else, namely, the contributory negligence of the plaintiff. Similarly I do not, speaking for myself, intend to decide that, if the circumstances of a case were such that, although the master had failed to perform the statutory duty, yet the injury would not have been occasioned to the plaintiff but for the additional fact of negligence on the part of a fellow-servant, that would not be a good defence to the action. Subject to these observations I entirely agree with the conclusion arrived at by my brothers on the second point; but I am not prepared to say that the defence of common employment can never under any circumstances be applicable in a case where there is an absolute statutory duty. I very much doubt whether the observations of Lord Chelmsford in *Wilson* v. *Merry*(1) really come to anything more than what I have just said. I entirely agree with what my brother Rigby said by way of criticism on Lord Chelmsford's comments on *Gray* v. *Pullen* (2), but the observations he makes on the possibility of setting up the doctrine of common employment in a case where there is a breach of a statutory duty can stand by themselves irrespectively of his comments on *Gray* v. *Pullen*. (2) For the above reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiff: *Riddell, Vaizey & Smith, for J. H. Jones, Cardiff.*

Solicitors for defendant: *William Hurd & Son, for G. C. James, Merthyr Tydvil.*

(1) L. R. 1 H. L., Sc. 326. (2) 5 B. & S. 970.

E. L.

C. A.
1898
June 15.

[IN THE COURT OF APPEAL.]

MONTGOMERY & CO. *v.* DE BULMES.

County Court—Jurisdiction—Judgment recovered in High Court for Amount of Debt—Order made in County Court for Payment of Debt by Instalments—Execution—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*County Court Rules*, 1889, *Order* XXV., *r.* 26.

If a creditor, who has recovered judgment against his debtor in the High Court, afterwards obtains from a county court judge an order under s. 5 of the Debtors Act, 1869, for payment of the debt by instalments, he cannot, so long as that order is in force, issue execution upon his judgment in the High Court.

The dicta of Cave J. in *In re Ives, Ex parte Addington*, (1886) 16 Q. B. D. 670, 671, dissented from, and the principle of *Jones* v. *Jenner*, (1856) 25 L. J. (Ex.) 319, approved.

APPEAL from order of Darling J. at chambers.

The plaintiffs had brought two actions in the High Court against the defendant, and had recovered judgment in both of them: in one action for 50*l.* 4*s.* 9*d.*, and in the other for 96*l.* 11*s.* 3*d.* They then, in the belief, it was said, that the defendant had no property other than a salary, took out under s. 5 of the Debtors Act, 1869, a judgment summons in each action in the county court of Liverpool, and these summonses came on before the judge of that court on May 3, 1898. There was some dispute as to what took place before the learned judge; but according to the evidence on the part of the defendant, which was accepted by the Court, the two summonses were heard together, and the judge of the county court offered the plaintiffs in the alternative either an order for the payment of both judgment debts by instalments of 1*l.* 10*s.* a month on each judgment debt, or an order for payment of the debt of 50*l.* 4*s.* 9*d.* by instalments of 3*l.* a month, with an adjournment for six months of the other summons for 96*l.* 11*s.* 3*d.* A discussion took place, and in the result the county court judge made an order on the summons for 50*l.* 4*s.* 9*d.* for payment by instalments of 3*l.* a month, and adjourned the other summons for

six months. The plaintiffs took no objection to this course, but they afterwards issued two separate writs of fieri facias in respect of these two judgment debts, one of which, namely, that relating to the debt of 50*l.* 4*s.* 9*d.*, was withdrawn. The defendant then applied to the district registrar to set aside the execution. The matter was referred to the judge in chambers, and Darling J., on May 26, 1898, made an order setting aside with costs the writ of fieri facias, and all subsequent proceedings thereon.

Against that order the plaintiffs now appealed.

T. Willes Chitty, for the plaintiffs, in support of the appeal. At the time the plaintiffs took out the judgment summons they believed that the defendant had nothing beyond his salary; but it appeared from the evidence given in the county court that he was possessed of certain furniture which the plaintiffs are entitled to take. They are entitled to pursue all their remedies at the same time, and although they obtained an order in the county court for payment of the judgment debt of 50*l.* 4*s.* 9*d.*, that does not prevent them from afterwards levying execution on their judgment in the High Court. Under the Debtors Act, 1869, s. 5, sub-s. 2, imprisonment under the section for default in payment does not operate as satisfaction or extinguishment of the debt, or deprive the creditor of his right to execution, and there is nothing whatever in the Act to give such an operation to an order to make payment by instalments. The judgment of Cave J. in *In re Ives, Ex parte Addington* (1), is an authority to this effect, and that case was not brought to the attention of the learned judge in chambers. The case of *Jones* v. *Jenner* (2), which was cited to him, was of a different character. Order xxv., r. 26, of the County Court Rules, 1889, is not against the plaintiffs. The court referred to therein is the county court. The definition in s. 186 of the County Court Act, 1888 (51 & 52 Vict. c. 43), shews that this is so; and according to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31, expressions in rules made in pursuance of

(1) 16 Q. B. D. 665. (2) 25 L. J. (Ex.) 319.

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an Act are to be construed in the same way and have the same meaning as the same words in the Act itself, unless the contrary intention appears. The plaintiffs were entitled to issue writs of fieri facias on both these judgment debts, and the order made by Darling J. ought to be discharged.

A. D. Bateson, for the defendant. The decision in *Jones* v. *Jenner* (1) has never been doubted. It is a distinct authority that a judgment creditor who goes to a county court and accepts an order for payment of his debt by instalments must remain in the inferior court, and enforce his judgment there, and cannot while that order subsists levy execution under a judgment he has obtained in the High Court, which must be treated as modified to that extent. *Jones* v. *Jenner* (1) was not cited to Cave J. in *In re Ives, Ex parte Addington* (2), and the learned judge's observations in that case are only dicta. Under the Debtors Act, 1869, s. 5, sub-s. 2, "any court" (which includes a county court) may direct any debt due in pursuance of any judgment "of that or any other competent court" to be paid by instalments, and may from time to time rescind or vary such order. And what the county court judge has done here is to make an order which in effect postpones the order of the High Court for six months, so that execution cannot issue out of the High Court, but must issue if at all out of the county court: County Court Rules, 1889, Order XXV., r. 26. The Court has ample power to stay execution in a proper case: Rules of Supreme Court, Order XLII., r. 17 (*b*). And this is a proper case, for the respondent is not in default as to any instalment.

T. Willes Chitty, in reply.

CHITTY L.J. said that the question before the judge of the county court being as to the means of the debtor and whether he should be committed or not, the learned judge must have considered both summonses together, and dealt with them as one—and this, the Lord Justice held, was the result of the evidence. He then continued: The question is whether, in

(1) 25 L. J. (Ex.) 319. (2) 16 Q. B. D. 665.

point of law, the plaintiffs, who have voluntarily gone to the county court judge and put in motion s. 5 of the Debtors Act, 1869, can afterwards levy execution on the judgment in the High Court without going to the county court judge and getting the order made by him discharged. I think that the Act means that if a party goes to the county court and accepts an order from the judge there for payment by instalments, he thereby elects to have the judgment of the High Court modified to the extent of that order.

That the county court judge has that power is unquestionable. "Any court" (which includes a county court) "may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order." That is the language of s. 5. It seems to me that so long as the county court judge's order stands there is a modification of the order of the High Court; and it would involve a great injustice to a defendant if it were not so. The defendant is told that he is to pay by instalments, and the instalments in such a case are generally small. In this case the plaintiffs did not see their way to obtaining execution, and they thought that this was the best way of getting their money, and the defendant has loyally and faithfully obeyed the order since it was made, and has paid his instalments up to the present. A man in such a position exerts himself in order to get the money together for the purpose of complying with the order. He does so under stress of a liability to imprisonment if he makes default, but I think he would be likely to be misled, and it would put him in a hard position if he were told that he was still liable, in spite of that, to pay the whole debt, and that what goods he had could be taken in execution.

It has been put forward as a ground for this application that the plaintiffs have discovered that the defendant had some furniture; but they knew that, when they obtained the order of the county court judge, and they nevertheless took the order. The result is that so long as that order stands they are not entitled to issue execution; and as regards the adjournment of

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the second summons, I think that is part of the order which the county court judge made on both summonses. He said that the defendant was to pay 30*s.* instalments on the two summonses or 3*l.* instalments on the one, and in the latter event he would adjourn the second summons. For what purpose? To see whether the defendant does or does not loyally comply with the order. Then it is pointed out that under s. 5 of the Act of 1869 imprisonment does not operate as a satisfaction of a debt, and that the Act is silent as to the operation of an order for payment by instalments. There is, it is true, nothing in the Act about it; but it appears to me that the reasonable construction of the Act is as I have stated.

As regards the authorities, there is *Jones* v. *Jenner* (1), which was in 1856, long before the Act of 1869 was passed, and there it was held that after proceeding in a county court upon a judgment in the High Court, the plaintiff could not issue execution in the High Court. In that case Pollock C.B. said: "If a plaintiff elects to enforce his judgment in the inferior court, there he must remain." The actual decision was that the plaintiff could not obtain a garnishee order. The report, no doubt, is short, and the reasons as given by the different judges are not quite the same, but all come to the same conclusion, namely, that the plaintiff should not take his garnishee order; and the Chief Baron said that a writ of fieri facias on the judgment could not then be issued in that court. That, as I have already said, was before 1869, but the principle is the same as in this case. The application there to the county court was founded on a plaint issued in the county court upon the judgment in the High Court. Now, having regard to the Act of 1869, it is not necessary to do that; the application can be made direct to the county court judge himself, but the reasoning of what the Chief Baron said applies to the present case.

Against that there is what Cave J. said in *In re Ives, Ex parte Addington.* (2) I have attended to that, as I should to anything that fell from that learned judge; but it seems to me that he has not taken the right view. The view he has taken is inconsistent with that taken by the Court of Exchequer in

(1) 25 L. J. (Ex.) 319.

(2) 16 Q. B. D. 665.

Jones v. *Jenner* (1), and it seems to me that the more reasonable view was that adopted by that Court. The observations of Cave J. were addressed to the Act of 1869; but they have no special force, in my opinion, beyond this, that they are to be treated with respect as dicta. The decision in *Jones* v. *Jenner* (1) was not cited to the learned judge. Possibly, if he had been aware of that case, he would not have said what he did.

I think it is not necessary to travel into the somewhat entangled questions which have been raised with regard to r. 26 of Order xxv. of the County Court Rules. I think we ought to dismiss this appeal.

COLLINS L.J. I do not think it necessary to add anything to the full reasons which the Lord Justice has given, with which reasons I entirely agree.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co., for Simpson, North, Harley & Birkett, Liverpool; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

(1) 25 L. J. (Ex.) 319.

W. W. K.

1898
July 14.

BLAKE *v.* WOOLF.

Landlord and Tenant—Premises let in Floors—Injury from overflowing Cistern—Negligence of Plumber.

The defendant was the owner of premises to which water was laid on, and he had a cistern on the fourth floor. The plaintiff became tenant of the ground-floor, and took his supply of water from the defendant. A leakage from the cistern having been noticed by the plaintiff, he informed the defendant, who instructed a competent plumber to remedy it. In consequence of the negligence of the plumber an overflow occurred, which damaged the plaintiff's goods :—

Held, that the defendant was not liable, since the plaintiff had assented to the water being on the premises, and therefore the defendant, by instructing a competent plumber to remedy the leakage, had discharged his duty to the plaintiff.

Appeal from the City of London Court.

The defendant was the owner of certain premises in Wood Street, Cheapside. He had laid on water to the premises, and had a cistern upon them on the fourth floor. After the water had been laid on the plaintiff became tenant of the ground-floor and basement of the premises, and received his water supply from the defendant's cistern. On a certain Friday it was discovered that there was a leakage from the cistern. The defendant being informed of this, instructed a plumber to put the cistern to rights. The plumber was negligent in doing so, and on Monday morning it was found that water had escaped from the cistern and damaged the plaintiff's goods, which were upon the portion of the premises occupied by him. This action was brought to recover damages for the injury sustained by the plaintiff. The judge found that the defendant had not been negligent in employing the plumber, but that the damage had been caused by the negligence of the plumber, and gave judgment for the plaintiff. The defendant appealed.

Ritter, for the appellant. There was no evidence of negligence on the part of the appellant. In entrusting the work to a competent plumber he did all that a reasonable man could do,

and he cannot be made responsible for the plumber's mistakes or want of care: *Carstairs* v. *Taylor* (1); *Ross* v. *Fedden.* (2)

[He was stopped.]

H. Tindal Atkinson, for the respondent. It was the duty of the appellant to keep the premises in proper repair: *Miller* v. *Hancock* (3), and he cannot get rid of that obligation by delegating it to another: *Hardaker* v. *Idle District Council* (4); *Hughes* v. *Percival* (5); *Dalton* v. *Angus* (6); *Tarry* v. *Ashton.* (7)

[WRIGHT J. referred to *Anderson* v. *Oppenheimer* (8) and *Gill* v. *Edouin.* (9)]

The appellant, having brought water on to his premises, was bound to take care that it should not escape to the injury of his neighbours: *Rylands* v. *Fletcher.* (10)

WRIGHT J. I am not at all clear that this case is covered by authority. The facts, shortly stated, are as follows. The defendant was the landlord of premises which were let out in flats. Water was laid on to the premises, and the plaintiff, who was one of the tenants, took part of the premises after the water had been laid on, and obtained his supply of water from the landlord's cistern. On a certain Friday a leakage was discovered from the cistern. The landlord was informed of this, and he sent for an independent plumber to put the cistern to rights. The plumber or his workmen being negligent in what they did, the result was that when the plaintiff's premises came to be opened on the Monday it was found that there had been a considerable escape of water from the cistern, and that the plaintiff's goods were damaged. The question that we have to decide is whether the landlord is responsible for that damage or not. Mr. Tindal Atkinson does not rest his claim on any express contractual liability on the part of the defendant, and we have no evidence as to the particular terms of the plaintiff's

(1) (1871) L. R. 6 Ex. 217.
(2) (1872) L. R. 7 Q. B. 661.
(3) [1893] 2 Q. B. 177.
(4) [1896] 1 Q. B. 335.
(5) (1883) 8 App. Cas. 443.
(6) (1881) 6 App. Cas. 740.
(7) (1876) 1 Q. B. D. 314.
(8) (1880) 5 Q. B. D. 602.
(9) (1894) 71 L. T. (N.S.) 762; (1895) 72 L. T. (N.S.) 579.
(10) (1868) L. R. 3 H. L. 330.

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Wright J.

tenancy. The question is, therefore, what is the position at common law? The general rule as laid down in *Rylands* v. *Fletcher* (1) is that primâ facie a person occupying land has an absolute right not to have his premises invaded by injurious matter, such as large quantities of water which his neighbour keeps upon his land. That general rule is, however, qualified by some exceptions, one of which is that, where a person is using his land in the ordinary way and damage happens to the adjoining property without any default or negligence on his part, no liability attaches to him. The bringing of water on to such premises as these and the maintaining a cistern in the usual way seems to me to be an ordinary and reasonable user of such premises as these were; and, therefore, if the water escapes without any negligence or default on the part of the person bringing the water in and owning the cistern, I do not think that he is liable for any damage that may ensue. Another qualification of the general rule enunciated in *Rylands* v. *Fletcher* (1) is that if the person claiming to be compensated has consented to the dangerous matter being brought on to the defendant's land he cannot recover. In this case the plaintiff, by taking these premises with water laid on to them and accepting his supply of water from the defendant's cistern, must be taken to have assented to water being kept on the premises by the defendant. Instances of this kind are to be found in *Ross* v. *Fedden* (2), *Anderson* v. *Oppenheimer* (3), *Carstairs* v. *Taylor* (4), and *Gill* v. *Edouin*. (5) The defendant, therefore, is not liable unless the damage was caused by his wilful default or neglect. Now, is there enough here to shew such negligence on the part of the defendant? It is not suggested that he was personally negligent. It is admitted that personally he did all that he could do. If he had endeavoured to repair the leakage himself he would, as has been pointed out, have been guilty of the worst kind of negligence. He, however, sends for a skilled plumber, and it is in consequence of the negligence of this man or his servants that the damage

(1) L. R. 3 H. L. 330.
(2) L. R. 7 Q. B. 661.
(3) 5 Q. B. D. 602.
(4) L. R. 6 Ex. 217.
(5) 71 L. T. (N.S.) 762; 72 L. T. (N.S.) 579.

occurs. It has been contended that where realty is concerned a person employing an independent contractor to execute works is just as liable for any damage occasioned by him as if the works were done by his own servant. I do not think that that is established. In *Dalton* v. *Angus* (1) and *Hughes* v. *Percival* (2), and the other cases cited, the act complained of was a breach of an absolute right, such as the right of support. Such a right is infringed at the peril of the person infringing it. But, as I have said, it is clear from *Rylands* v. *Fletcher* (3) that there is no such absolute right here, since this case falls within the exceptions to the rule there laid down. Therefore, I think that the ordinary rule that a person is not responsible for the negligence of an independent contractor applies, and that the defendant is not liable. It is not like the case of a statutory duty, where, of course, the person who performs it by an independent contractor is responsible for any damage that he does.

The test is, was there negligence on the part of the defendant? I think that there was none; and, therefore, the judgment of the City of London Court cannot be sustained, and this appeal must be allowed.

DARLING J. concurred.

Appeal allowed. Leave to appeal refused.

Solicitors for appellant: *H. Dade & Co.*
Solicitors for respondent: *Phelps, Sidgwick & Biddle.*

(1) 6 App. Cas. 740. (2) 8 App. Cas. 443.
(3) L. R. 3 H. L. 330.

A. P. P. K.

1898
July 19, 22.

ADAM *v.* THE BRITISH AND FOREIGN STEAMSHIP COMPANY, LIMITED.

Negligence—Injury causing Death—Alien—Negligence of British Subject—Cause of Action outside Jurisdiction—Fatal Accidents Acts, 1846 *and* 1864 (9 *&* 10 *Vict. c.* 93; 27 *&* 28 *Vict. c.* 95).

The Provisions of the Fatal Accidents Acts, 1846 and 1864, by which damages can be recovered for death caused by negligence, do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death has been caused by the negligence of a British subject, outside the jurisdiction of the Court, cannot maintain an action to recover damages in respect of the death.

FURTHER CONSIDERATION before Darling J.

The action was brought by the plaintiff to recover damages under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93, commonly known as Lord Campbell's Act), for the death of her son Arnold Adam. The deceased was a Belgian subject, and was the second engineer of the Belgian steamship *Concha*. On July 27, 1897, a collision took place, on the high seas, outside the jurisdiction of the Court, between the *Concha* and the steamship *Saint Fillans*, belonging to the defendants, by which the *Concha* was sunk, and Adam, and several others on board her, were drowned. The collision was caused by the negligence of the defendants or their servants.

This case, together with three others, arising out of the same collision, and raising the same question, was tried on July 19, 1898, before Darling J. and a common jury. It was not disputed that the collision was caused by the negligence of the defendants' servants, but the point was taken on behalf of the defendants that the provisions of the Fatal Accidents Acts, 1846 and 1864 (9 & 10 Vict. c. 93, and 27 & 28 Vict. c. 95), do not apply for the benefit of aliens abroad, and judgment was reserved on this question. Sect. 1 of the Act of 1846, on which the question turned, is set out in the judgment.

Kemp, Q.C., and *Lewis Noad*, for the plaintiff.
Horridge and *D. H. Crompton*, for the defendants.

In addition to the authorities which are discussed in the judgment the following were referred to: *Cope* v. *Doherty* (1); *The Saxonia*. (2)

The jury found for the plaintiff for 200*l*. damages.

Cur. adv. vult.

July 22. The following written judgment was delivered by

DARLING J. This is an action brought by the mother of one Adam, a Belgian subject, an engineer on board a Belgian ship, the *Concha*. He was drowned owing to a collision between that ship and the *Saint Fillans*, a ship of the defendants (English subjects). The collision took place on the high seas, outside the jurisdiction of this Court, and, it is admitted, was caused by the negligence of the defendants. The jury awarded the plaintiff 200*l*. damages.

The questions to be determined are of no ordinary difficulty, and of much more than ordinary interest and importance. On behalf of the defendants it was argued by Mr. Horridge that the provisions of Lord Campbell's Act, 9 & 10 Vict. c. 93 (3), and 27 & 28 Vict. c. 95 (4), do not apply for the benefit of aliens. By s. 1 of Lord Campbell's Act it is enacted "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

No point was raised as to whether the plaintiff was a person having the necessary status within s. 2 of Lord Campbell's

(1) (1858) 2 De G. & J. 614; 27 L. J. (Ch.) 600.

(2) (1862) Lush. 410; 31 L. J. (P. M. & A.) 201.

(3) "The Fatal Accidents Act, 1846" (Short Titles Act, 1896, 59 & 60 Vict. c. 14).

(4) "The Fatal Accidents Act, 1864" (Short Titles Act, 1896, 59 & 60 Vict. c. 14).

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Act; and I therefore in this action, and the others arising out of the same circumstances, proceed on the assumption that the plaintiffs are entitled to maintain the actions respectively, provided any representatives of aliens may sue in the circumstances of this case. There can, I think, be no doubt that had the deceased been an English subject this action would have lain, notwithstanding that the negligence and death both occurred upon the high seas, and therefore outside the territorial limit and jurisdiction. It is unnecessary for this proposition to do more than refer to the cases of *Mostyn* v. *Fabrigas* (1) and the *British South Africa Co.* v. *Companhia de Moçambique* (2), and to the various authorities there cited. Mr. Kemp, Q.C., on behalf of the plaintiff, relied upon the case of *The Explorer* (3) as an authority for saying that such an action as this would lie. And no doubt the judgment in that case assumes that it would do so; but this question was not argued; and the judgment there given is, upon the points there in issue, reversed by the case of *Seward* v. *Vera Cruz* (4), as is also the case of *The Guldfaxe* (5), upon which the judgment in *The Explorer* case (3) proceeded. This case of *The Guldfaxe* (5) had already been sufficiently discredited in *Simpson* v. *Blues*. (6)

Independently of Lord Campbell's Act it was conceded that the representative of an alien killed by the negligence of a British subject on the high seas cannot maintain an action in this Court. Now Lord Campbell's Act gives a new cause of action. That is decided by Lord Selborne in the case of *The Vera Cruz* (7); but it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refer to them. In the case of *The Zollverein* (8) Dr. Lushington says: "In looking to an Act of Parliament—as to whether it is intended to apply to

(1) (1774) 1 Cowp. 161; 1 Sm. L. C. (10th ed.) 572.
(2) [1893] A. C. 602.
(3) (1870) L. R. 3 A. & E. 289.
(4) (1884) 10 App. Cas. 59.
(5) (1868) L. R. 2 A. & E. 325.
(6) (1872) L. R. 7 C. P. 290.
(7) 10 App. Cas. at p. 67.
(8) (1856) 2 Jur. (N.S.) 429; Swabey, 96.

foreigners or not—I should always bear in mind the power of the British Legislature; for it is never to be presumed, unless the words are so clear that there can by no possibility be a mistake, that the British Legislature exceeded that power, which, according to the law of the whole world, properly belonged to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further." And Lord Esher, in *Colquhoun* v. *Heddon* (1), expresses himself as follows: "The proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words, and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when Parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our Parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and unless it does so in express terms so clear that their meaning is beyond doubt, the Courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of Parliament." Further, Jervis C.J., in *Jefferys* v. *Boosey* (2), lays down the law in these words: "Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the Legislature to protect. Natural-born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the Legislature; but no duty can be imposed upon aliens resident abroad, and with them the Legislature of this country has no concern, either to protect their interests or to control their rights."

Now, I ask, is there anything in Lord Campbell's Act to

(1) (1890) 25 Q. B. D. 129, at p. 135. (2) (1854) 4 H. L. C. 815, at p. 946.

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shew that it was intended to apply for the benefit of foreigners not resident in this kingdom? I do not think that there is. The intention of the Legislature is to be collected from the statute; and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of 9 & 10 Vict. c. 93. Moreover, that statute provides, in s. 2, for the division of the damages recovered amongst the various persons to be benefited in proportions to be assessed by the jury. It appears to me impossible to hold that it was intended, there being no expression to that effect, to cast upon juries such a duty as this in regard to the distant family of a deceased, and possibly polygamous, alien.

An Act of the British Parliament is not an allocution addressed *urbi et orbi*.

My judgment is, for the reasons I have given, for the defendants, in this case, and in the three other actions brought against them in respect of the collision between the *Saint Fillans* and the *Concha*.

Judgment for the defendants.

Solicitors for plaintiff: *William A. Crump & Son.*

Solicitors for defendants: *Thomas Cooper & Co., for Simpson, North, Harley & Birkett, Liverpool.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1898
July 12.

SALT UNION, LIMITED *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY.

Railway—Regulation—Rates for Merchandise—Siding not belonging to Railway Company—Station Accommodation and Terminal Services—Allowance or Rebate in respect thereof—Evidence—Onus of Proof—Railway and Canal Traffic Act, 1894 (57 & 58 *Vict.* c. 54), s. 4.

By s. 4 of the Railway and Canal Traffic Act, 1894, whenever merchandise is received or delivered by a railway company at a siding not belonging to the company, and a dispute arises as to any allowance or rebate to be made from the rates charged in respect that the railway company does not provide station accommodation or perform terminal services, the Railway Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.

At the hearing of an application for an allowance or rebate under this section on the ground that the rates charged by the railway company, in respect of goods sent from the applicants' siding, included a charge for station accommodation at the siding:—

Held, by A. L. Smith and Rigby L.JJ., Vaughan Williams L.J. not assenting, that the applicants, by merely proving that they were charged the rates, and that the siding did not belong to the railway company, had not made out a primâ facie case that the rates included a charge for station accommodation at the siding so as to throw upon the railway company the onus of proving that the rates did not include a charge for station accommodation.

APPEAL from the judgment of the Railway Commissioners upon an application under s. 4 of the Railway and Canal Traffic Act, 1894. (1)

The application stated that the applicants, the Salt Union,

(1) 57 & 58 Vict. c. 54, s. 4: "Whenever merchandise is received or delivered by a railway company at any siding or branch railway not belonging to the company, and a dispute arises between the railway company and the consignor or consignee of such merchandise as to any allowance or rebate to be made from the rates charged to such consignor or consignee in respect that the railway company does not provide station accommodation or perform terminal services, the Railway and Canal Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate."

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Limited, were manufacturers of salt, carrying on business at, amongst other places, Wheelock and Malkins Bank, upon premises adjacent to the North Staffordshire Railway, and connected therewith by sidings which belonged to the applicants, and were situate upon their premises, and which did not belong to the railway company; that the applicants consigned salt from each of their sidings for carriage over the railway, the contracts and charges for the carriage of the salt being made with and paid to the railway company; and at the initial terminus the applicants did not make use of any accommodation at a terminal station provided by the railway company, nor did the railway company perform any duties at a terminal station. The applicants claimed to be entitled to an allowance or rebate from the rates upon such salt traffic charged to them by the railway company in respect that the company did not provide station accommodation for the traffic, and applied to the Railway Commissioners to determine what were the reasonable and just allowances or rebates to be made from the rates charged in respect of the salt traffic passing from the applicants' sidings at Wheelock and Malkins Bank.

The railway company in their answer admitted that the sidings in question belonged to the applicants, but denied that any charge for station accommodation or terminal services at the initial terminus was included in the rates charged to the applicants, and alleged that therefore the applicants were not entitled to any allowance or rebate.

At the hearing the applicants put in a table of rates charged by the railway company for the carriage of the salt from the applicants' sidings. The table, which was supplied to the applicants by the railway company, gave an analysis of the rates, and did not shew upon its face a charge for station accommodation at the sidings in question. No comparable rate in the case of comparable traffic was put in with the view of shewing that in other instances where the railway company provided station accommodation at the two terminal stations the rates charged were the same as in this case.

At the conclusion of the applicants' case it was submitted on behalf of the railway company upon the above evidence that

the applicants had made out no case. Wright J. held that there was no evidence that a terminal charge at the sidings was included in the rates. The learned judge said that there was no evidence that the rates had been built up by putting together so much for conveyance, so much for one station terminal, and so much for a second station terminal. The Court could not presume from the evidence that a second terminal was included in the rate. At the same time he wished to reserve to the Court the right to inquire under s. 4 of the Act of 1894 whether a trader was not entitled to a rebate, although the rate might be within the maximum, where a comparable rate could be shewn with reference to which the question could be raised, and he should have thought that this case ought not to be stopped if there had been any evidence of a comparable rate. This question was reserved by Collins J. in *New Union Mills Co.* v. *Great Western Ry. Co.* (1), and he also wished to reserve it. The applicants had therefore not made out a case calling for any answer from the railway company.

From this decision the applicants appealed.

Cripps, Q.C., and *R. Whitehead*, for the applicants. The learned judge was wrong in ruling that the applicants had not made out a primâ facie case. It is sufficient, under s. 4 of the Railway and Canal Traffic Act, 1894, for the applicants, in order to make out a primâ facie case for an allowance or rebate, to prove that the siding or branch railway at which the merchandise is received or delivered by the railway company does not belong to the company, and that the company have charged the applicants a rate in respect of the merchandise consigned to or from the siding or branch railway. When the applicants have proved those two things, it then lies upon the railway company to prove that the rate does not include a charge for station accommodation or terminal services. If that is not so, the section will be rendered useless to the trader, because the railway company alone know whether they have charged for station accommodation or terminal services. Sect. 4 says: "in respect that the railway company does not provide station

(1) [1896] 2 Q. B. 290, at p. 296.

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accommodation or perform terminal services." That is all that the applicants need prove, and it is not necessary that they should go on and prove that the rate charged includes a charge for station accommodation or terminal services, the words of the section not being "in respect that the railway company has charged for station accommodation or terminal services." That was the way in which Collins J. dealt with the section in *Corporation of Birmingham* v. *Midland Ry. Co.* (1), where he said: "I am not satisfied that the applicants have here discharged the onus thrown upon them of satisfying me that there is any charge whatever for station accommodation. . . . I think it was quite competent for the witnesses for the defence to come here as they did and deny that there was any station charge made in the rate." In that case the corporation took upon themselves the onus of proving that the rate included a charge for station accommodation, and put their case in that way; but Collins J. does not say that they were bound to go so far as that, and the Court did not stop the case after the evidence for the applicants had been given, but heard it out, the railway company calling their witnesses. The question was referred to but not decided in *New Union Mills Co.* v. *Great Western Ry. Co.* (2); and in *Pidock* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) Collins J. said that the section intended to give a rebate "'in respect that,' that is, in proportion as or to the extent that the company do not provide station accommodation or perform terminal services." That is the true construction of those words. Wright J. seemed to think that a comparable rate was the proper mode of proving the applicants' case. That, no doubt, may be one way of making out a primâ facie case, but it would be narrowing the section too much to say that it is the only way. Therefore, upon proof that the sidings did not belong to the company, and that the company charged rates, a primâ facie case was made out calling for an answer from the company.

Littler Q.C., and *E. R. Moon*, for the railway company.

(1) (1896) 9 R. & C. Traf. Ca. 165, at p. 170.

(2) [1896] 2 Q. B. 290, at p. 296.

(3) (1895) 9 R. & C. Traf. Ca. 45, at p. 52.

The applicants must prove their case. The onus lies upon them to make out a primâ facie case that the rates include a charge for station accommodation or terminal services at the sidings belonging to the applicants. Sect. 4 provides for what may be called the reference of the dispute to arbitration, and the party making the claim must prove it. The onus cannot lie upon the railway company to prove that they did not include such a charge in the rates. The judgment of Collins J. in *Corporation of Birmingham* v. *Midland Ry. Co.* (1) shews that the onus is on the applicants, and not on the railway company. The applicants ought either to prove by direct evidence that the charge is included, or give suc evidence as would raise a presumptive case that the charge is included, as, for instance, by means of a comparable rate. No such evidence was given here, and therefore the applicants made out no case calling for an answer by the railway company.

Cripps, Q.C., replied.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. This is an application by the Salt Union, Limited, a trading company, to the Railway Commissioners under s. 4 of the Railway and Canal Traffic Act, 1894, asking them to grant an allowance or rebate from the rates charged to the applicants for salt sent from the applicants' own sidings over the railway company's lines, upon the ground that the railway company have in the rates charged them for station accommodation and terminal services which the company do not provide or render.

The contention put forward on behalf of the applicants is this, that upon the true construction of s. 4 of the Railway and Canal Traffic Act, 1894, when they have proved that they own the sidings from which the traffic is despatched, and that they do not therefore require or have station accommodation or terminal services from the railway company, and that they have been charged a rate for the traffic consigned from their sidings for carriage over the railway, they have made out a

(1) 9 R. & C. Traf. Ca. 165.

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primâ facie case, and that it is not necessary for them to go on and prove that the rate charged includes a charge for station accommodation or terminal services, but that it then lies upon the railway company to prove a negative, namely, that they have not charged the applicants for station accommodation or terminal services. That is the argument advanced on behalf of the applicants. Now it appears to me a strange proposition that a railway company, who are in the position of defendants, should be called upon to prove a negative when no affirmative case has been made out against them. The applicants claim an allowance or rebate. An allowance or rebate, in my opinion, implies that the trader has been charged for that in respect of which the allowance or rebate is claimed. The ground of the claim is that the trader has been charged by the railway company for station accommodation or terminal services which the company had no right to charge for, because the trader had his own station accommodation. I do not think that the construction which the applicants contend for is the true construction of the section. In my opinion the meaning of the section is that if a trader makes out by any evidence, whether by means of a comparable rate, as in the case of *Corporation of Birmingham* v. *Midland Ry. Co.* (1), or by any other means, a primâ facie or presumptive case that he has been wrongly charged for station accommodation or terminal services, then the Railway Commissioners should say that a case has been made out which the railway company are called upon to answer, and that the company must then shew that they have not made the charge of which primâ facie evidence has been given. But I cannot see how an applicant under this section, by merely proving that he has been charged a rate and that he has not had station accommodation provided for him or terminal services rendered to him by the railway company, without at the same time giving some evidence that he has been charged more than he ought to have been, can call upon the company to produce their evidence and answer a case which is only in the air and has not been made out even by presumptive evidence against them. I cannot

(1) 9 R. & C. Traf. Ca. 165.

accept the view of the section put forward on behalf of the applicants.

In arriving at this construction of the section I have the authority of my brother Collins in the case of the *Corporation of Birmingham* v. *Midland Ry. Co.* (1) In that case the corporation of Birmingham had coal consigned to them, and that coal was delivered by the railway company partly at the corporation's private siding at Saltley and partly at the railway company's siding at Lawley Street. In the one case, therefore, the corporation had the use of the company's siding, and in the other case they had not, but they were charged the same rate to both sidings. Collins J. said (2): "They"—that is, the corporation—"are the applicants, and to make good that contention it seems to me they must satisfy this tribunal to begin with that they have been called upon to pay a charge which they ought not to pay by reason of the fact that they have not received the accommodation or had the benefit of the services in respect of which that charge is made . . . . It seems to to me, unless they make good that position, they have not established their primâ facie right to a rebate on proof that Saltley is not a terminal station." That is exactly the view of the section which I have been trying to express, namely, that to bring themselves within this section the applicants must give some presumptive evidence that they have been called upon to pay a charge which they ought not to be called upon to pay by reason of their not having received station accommodation or had the benefit of terminal services. The question which arose in the present case was whether the applicants at the end of their evidence had made any case within s. 4. An applicant is entitled to bring his case before the Railway Commissioners,—that I do not doubt,—but, having given all the evidence he can, the question then arises whether he has brought his case within the section by giving some evidence that in the rate which he has been charged something has been included for station accommodation or terminal services which he has not had. As my brother Collins says in another part of his judgment (3),

(1) 9 R. & C. Traf. Ca. 165. (2) 9 R. & C. Traf. Ca. at p. 169.
(3) 9 R. & C. Traf. Ca. at p. 171.

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"the onus is on the applicants on every part of the case, and they must make out their case in order to entitle themselves to the rebate." For these reasons I think that this appeal must be dismissed.

RIGBY L.J. The question before us turns upon the construction of s. 4 of the Railway and Canal Traffic Act, 1894. In the first place, I am unable to read the section as if the words "in respect that the railway company does not provide station accommodation or perform terminal services" were not there, and in place thereof there were the words "in respect that the railway company has charged for station accommodation or terminal services." If that had been intended it would have been easy to have said so. On the language used it appears to me to be open to an applicant who brings himself within the section to prove his claim to an allowance or rebate in any way he can, and I am far from saying—though I do not decide it—that he might not prove his claim to an allowance or rebate without proof that the railway company had in fact charged him for station accommodation or terminal services. At the same time I do not hesitate to say that such an application, when it comes before the Railway Commissioners, must be treated in the same way as all other cases. The applicant has to make out a primâ facie case, and he can do that in any way he pleases. The way in which the applicants in the present case tried to make out a primâ facie case was by raising the presumption that they had been charged for this accommodation or for these services, and if they could have made that out no one can doubt that that would have been a sufficient ground, unless displaced by the railway company, for a decision in their favour. That was what the applicants undertook to prove, and the onus was upon them to make out that presumptive case. The learned judge who had to decide the point held that there was no evidence in support of the case attempted to be made by the applicants, namely, that a charge for station accommodation or terminal services was included in the rates. In my opinion, upon the point of law which has been taken before us, he was perfectly right in that. Objection was taken on behalf

of the applicants to that part of the judgment of the learned judge where he said that he would not have stopped the case if there had been any evidence of a comparable rate. But I do not understand the learned judge to have meant by that that an applicant cannot establish a case without shewing a comparable rate. That would narrow the construction of s. 4 too much. The learned judge simply said that the evidence of a comparable rate might have been evidence to support the case, even though the rate charged was below the maximum. He said that there was not that evidence in the present case, and that upon the rest of the evidence no case had been made out.

With regard to the judgment of Collins J. in *Corporation of Birmingham* v. *Midland Ry. Co.* (1), in my opinion the meaning of that judgment is that the applicants had taken upon themselves to shew that the railway company had charged for station accommodation or for terminal services, and that they were entitled to a rebate. The learned judge was quite right in saying that the onus of proving that case lay upon the applicants. They had to shew a primâ facie case calling for an answer from the railway company. In the present case the applicants endeavoured to make out that they had been charged for station accommodation or terminal services, and the learned judge said—and I agree with him—that there was no primâ facie evidence in support of that case. That was the only case which the applicants tried to make out. I do not think—and in this I may be differing from my brother A. L. Smith L.J.—that the section shuts out the applicant from making another case. An applicant can make any case which reasonably shews his right to an allowance or rebate, and I cannot think that he is confined to proving that the rate charged does in fact include a charge for station accommodation or terminal services.

VAUGHAN WILLIAMS L.J. As I understand, my brother Wright in the present case and my brother Collins in *Corporation of Birmingham* v. *Midland Ry. Co.* (1), have both decided

(1) 9 R. & C. Traf. Ca. 165.

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in clear terms that when a trader comes before the Railway Commissioners to invite them to exercise their jurisdiction under s. 4 of the Railway and Canal Traffic Act, 1894, it is part of the onus which is thrown upon the trader that he shall give primâ facie evidence that he is being charged by the railway company in respect of accommodation or services which the railway company have not provided or rendered by reason of the siding or branch railway at which the merchandise is received or delivered belonging to the trader and not to the railway company. Unless I held a strong opinion upon the point, I should not easily have persuaded myself to express an opinion differing from that of those two learned judges, who are very familiar with the particular subject-matter. When in addition to that I take into consideration the judgment just delivered by A. L. Smith L.J., my difficulty in expressing any different opinion is greatly enhanced. At the same time, I think it my duty to express my view as to the construction of the section, and also to state the reasons which enable me to arrive at the same result as my learned brothers do.

As regards the construction of s. 4, I do not think that the scope of the section has been quite rightly apprehended. It was treated in the argument on behalf of the railway company as if it was a section which provided that in case of past disputes, that is, in cases of an allegation of a wrong done and a remedy claimed, there should be what amounts to a statutory provision for reference to arbitration; and it was then said that, having got that statutory provision for reference to arbitration, it could not be reasonably suggested that the party who is in the position of plaintiff was not under an obligation to prove the wrong complained of. To my mind that is not the scope of the section at all. The scope of the section, as I understand it, is to provide not only for the past, but also for the future. What the section seems to me to say is this: Where the trader has his own siding or branch railway, and the railway company and the trader cannot agree as to what shall be the rate, or whether the rate actually charged by the railway company in the past and proposed to be charged by them in the future is a just rate, then in any such case the Railway Commissioners shall

fix the rate. The commissioners are by the section to "have jurisdiction to hear and determine such dispute"—a different thing, to my mind, from a cause of complaint—"and to determine what, if any, is a reasonable and just allowance or rebate." I confess that I do not feel at all certain that, whenever it is proved that the trader owns a private siding or branch railway, and that he consigns goods from the siding or branch railway over the lines of the railway company, and that a charge is made by the railway company against him, the trader has not a right, upon proof of those facts, to call upon the Railway Commissioners to determine what, if any, is a reasonable and just allowance or rebate to make by reason of the fact that the railway company have not the expense and trouble of providing station accommodation or of performing terminal services. I can conceive that the Legislature might well have contemplated the great advantage it would be to the trader to have the amount of this reasonable and just allowance or rebate fixed, because, when once it was fixed, the railway company would have, in every case where they came to justify their charge, whether made or proposed to be made, to give credit for the allowance or rebate fixed by the Railway Commissioners. For these reasons I am by no means sure that the Railway Commissioners had not this duty cast upon them at the time when Wright J. ruled that there was no evidence to support the applicants' case.

But upon the facts which the applicants themselves proved in this case I arrive at the same result as my learned brothers. Looking at the table of charges which is before us, it seems to me to be perfectly clear upon the face of this table that the charges do not include anything for station accommodation or terminal services. In these circumstances it seems to me that the learned judge was right in saying that in this case there was no occasion for making any reasonable and just allowance or rebate in respect that the railway company did not provide station accommodation or perform terminal services, because on the face of the charges which the applicants have put in, and which they have given no evidence to displace, it is plain that the company have not charged for providing station

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accommodation or for performing terminal services. In these circumstances I think that the decision was right. At the same time, as I have said, I am not prepared to say that it is necessary for the applicant to prove more than that the merchandise consigned is received or delivered by the railway company at a siding or branch railway not belonging to the company, and that a dispute has arisen between the railway company and the consignor or consignee as to the allowance or rebate to be made from the rates charged, and that upon proof of those facts only it is not the duty of the Railway Commissioners to determine what, if any, is a reasonable and just allowance or rebate both for the past and for the future. Even however if I am wrong in that, I see nothing in the Act which throws upon the applicants the duty of doing more than shewing that the amount charged seems to be an unreasonable amount to charge for the service rendered by the railway company. I agree therefore in the result that this appeal should be dismissed, though I do not arrive at that result in the same way as my brothers do.

Appeal dismissed.

Solicitors for applicants: *Neish, Howell & Macfarlane.*
Solicitors for railway company: *Burchell & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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July 4.

PHILLIPS *v.* THE SCHOOL BOARD FOR LONDON. COCKERTON *v.* SAME.

Education Acts—Teacher's Remuneration—Superannuation Fund—Management by Board—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

A school board established and managed a superannuation fund for the payment of allowances to their officers and teachers upon their superannuation. This fund was provided by annual deductions from the salaries of the officers and teachers, made in pursuance of contracts between them and the board:—

Held, affirming the judgment of a Divisional Court, that the officers and teachers could not recover back the amount of the deductions from their salaries, for (1.) even if it was ultra vires for the board to pay the expenses of managing the fund out of the school rates, it was no part of the contract between the board and the officers and teachers that this should be done, and the making of the contract was therefore not ultra vires; (2.) assuming that the board could not undertake the management of the fund, in the absence of power under the Elementary Education Acts to do so, the money having been applied to the purposes for which it was subscribed, and the subscribers having had the right to participate in the benefits of the fund, there had been no failure of consideration.

APPEAL from a judgment of a Divisional Court, reported [1898] 1 Q. B. 4.

The plaintiff in the first-named action entered the service of the defendants in 1884 as a teacher in a board school, and continued in that capacity down to April 4, 1897, when she resigned her post.

In January, 1888, the defendants passed a resolution establishing a scheme of superannuation allowances for all servants of the board, including the teachers, and resolving that, in consideration of such allowances being granted, a deduction of 2 per cent. should be made from the servants' salaries; but providing, as regards the teachers, that, in the event of certain parliamentary powers sought in connection with the scheme not being obtained within five years, the amounts deducted should be repaid. The scheme came into operation on March 25, 1888, and from that date down to March, 1893, 2 per cent. was,

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in accordance with the resolution, deducted from all the servants' salaries, including that of Miss Phillips.

In March, 1893, the defendants, having failed to obtain the parliamentary powers sought, passed a resolution that every officer appointed after that date should be appointed subject to a deduction of 2 per cent. from his or her salary, such amount to be carried to a superannuation fund; that every teacher then in the service of the board should be given the option of joining the superannuation fund subject to the condition of such deduction, and that any such teacher who was not desirous of joining the fund should be repaid the amounts of his or her contributions to the fund with interest. Miss Phillips, having received notice of the resolution, elected to join the fund on the terms above mentioned; and from that date down to the date of her resignation in April, 1897, a deduction of 2 per cent. continued to be made from her salary. In January, 1897, having given notice of her intended resignation, she claimed from the defendants a return of the deductions from her salary made from March, 1888, when the scheme first came into operation, down to date. That demand being refused, she brought this action in the county court to recover the sum of 32*l.* 6*s.* 8*d.*, being the aggregate of such deductions. Mrs. Cockerton, the plaintiff in the second action, was appointed as assistant teacher at one of the defendants' board schools on July 29, 1894, and had notice that she was appointed upon the terms specified in the above-mentioned resolution of March, 1893. On February 10, 1897, she left the service of the defendants, and brought this action to recover a sum of 3*l.* 13*s.* 9*d.*, the amount of the deductions from her salary. The county court judge held in each case that the plaintiff was not entitled to recover.

The plaintiffs appealed.

The Divisional Court (Wright and Kennedy JJ.) affirmed the decision of the county court judge. (1)

The plaintiffs appealed.

1898. June 16. *Jelf*, *Q.C.*, and *Organ*, for the plaintiffs.

(1) [1898] 1 Q. B. 4.

The defendant corporation have gone beyond their statutory powers in carrying out this superannuation scheme, and the only way in which the plaintiffs can be put in their original position is by the return to them of the money they have paid. The defendants have no right to expend any portion of their income in the management of the fund. In assuming the duty of administering the fund they are giving the security of the money of the ratepayers for the due administration of the fund, and in doing so are going beyond their powers. The limitation of the power of corporations is illustrated by the cases of *Colman* v. *Eastern Counties Railway* (1); *East Anglican Railways* v. *Eastern Counties Railway* (2); *Shrewsbury and Birmingham Railway* v. *London and North Western Railway*. (3) If once the scheme is shewn to be ultra vires, all that leads up to it is so also: *Hattersley* v. *Shelburne* (*Earl of*) (4), and the money paid can be recovered back: *Re Phœnix Life Assurance Co.* (5) *Hewlett* v. *Allen* (6) is distinguishable because the employers were not a corporation, and, further, the real point decided was that paying, by the authority of the servant, money to a particular body who were to take charge of it amounted to payment to the servant.

Lord Coleridge, Q.C., and *Ram*, for the defendants. The scheme is not ultra vires, but is a mode of payment of the teachers which has been adopted as a means of securing efficient teaching. Even if the scheme were ultra vires, the plaintiffs could not recover back the money paid by them with knowledge of all the facts.

Jelf, Q.C., in reply.

Cur. adv. vult.

July 4. A. L. SMITH L.J. read the following judgment:— This is an action brought by a teacher who for many years was in the service of the London School Board to recover from that board the sum of 32*l.* 6*s.* 8*d.*, being the amount of contributions voluntarily subscribed by her towards a superannuation

(1) (1846) 10 Beav. 1.
(2) (1851) 11 C. B. 775.
(3) (1853) 4 D. M. & G. 115.
(4) (1862) 31 L. J. (Ch.) 873.
(5) (1862) 31 L. J. (Ch.) 749.
(6) [1894] A. C. 383.

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fund promoted and carried on by the school board for the benefit and aid of the plaintiff and their other employees desirous of subscribing thereto.

The plaintiff now seeks to get back the money so paid by her to this fund, which has been applied by the board according to her directions, as being money had and received by the defendants to the use of the plaintiff, and in the alternative for arrears of salary, and she has brought her action in the county court in that behalf.

The learned county court judge gave judgment against the plaintiff, and the Divisional Court, consisting of Wright and Kennedy JJ., has affirmed his judgment, and the plaintiff now appeals to us against the decision of the Divisional Court.

In the year 1888 the School Board of London started the scheme for superannuation allowances to their employees, in case of their becoming disabled by permanent infirmity of mind or body, and took from those desirous of joining the scheme 2 per cent. upon the amount of their respective salaries for the formation of the necessary fund. It may also be stated that the board has been desirous of obtaining from Parliament authority (*a*) to defray the expenses of the management of the fund, (*b*) to guarantee the safe keeping of the same, but as yet has not obtained that authority.

It cannot be doubted that had the defendants been individuals, and not the creation of statute, there could have been no pretext for saying that the plaintiff could recover back the subscriptions voluntarily paid by her for the purpose of this fund, which subscriptions had been applied to such fund in accordance with her directions and desires. Her contract with such a defendant would be a perfectly lawful contract, and if authority were needed, which it is not, Lord Watson's judgment in *Hewlett* v. *Allen* (1) has only to be referred to as to this.

But it is argued on behalf of the plaintiff that although this may be so, as the school board is the creation of statute and can therefore only exercise the powers conferred upon it by statute, and as nowhere in the statute creating the board is to be found the power either to undertake or to administer a trust,

(1) [1894] A. C. 383, at p. 394.

which it is said the school board is doing by collecting, holding, and administering the subscriptions upon the advice and recommendation of a committee of superannuation, composed of the chairman of the board, five representatives elected by the board, and five representatives elected by the subscribers to the fund, or of paying ratepayers' money towards the expenses of carrying out the scheme which it is said the school board is also doing, the board is acting ultra vires, and that consequently this action is maintainable, for there has been a total failure of the consideration as to the purposes for which the moneys have been subscribed by the plaintiff to the fund.

By s. 35 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), which is the Act regulating the school board, it is enacted that "a school board may appoint a clerk and a treasurer and other necessary officers, including the teachers required for any school provided by the board, to hold office during the pleasure of the board, and may assign them such salaries or remuneration (if any) as they think fit."

The point as to the board having used ratepayers' money towards the expenses of the scheme, which was the point argued before the county court and the Divisional Court, is in my judgment untenable, for the contract between the plaintiff and the board makes no provision that the board shall use any of the ratepayers' money in carrying out the scheme, and, if they do so, it in no way makes the contract between the plaintiff and the board illegal, and the suggestion that the contract between the plaintiff and the board is ultra vires fails, and I agree with the Divisional Court upon this.

But the other point which came up during the argument in this Court still remains to be dealt with, and for the purposes of this case I will assume that the school board has contracted with the plaintiff to administer a trust, by undertaking to administer the funds of the superannuation scheme in the manner above mentioned, and that no provision can be found in the Act authorizing the board to do this.

I say I will assume, but not decide, that this is so, for in my judgment, even if this be so, it will not entitle the plaintiff to maintain this action either for money had and received as being

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money paid without consideration or for arrears of salary. If money had and received would lie the case of *Lamb* v. *Great Northern Railway* (1), approved of in this Court in *Hewlett* v. *Allen* (2), was wrongly decided, and I am not by any means prepared to hold that it was.

But assuming that what the board is doing is not authorized by statute either as regards expending ratepayers' money in the management of the scheme, or without spending such money as regards the administration of a trust, can the plaintiff recover back the subscriptions she has heretofore voluntarily made to this fund, which have been applied to the purposes thereof in strict accordance with her mandate?

This fund has been in existence from the year 1886 to the present time, and during the years 1889 to 1897 inclusive the plaintiff has been a voluntary subscriber of 2 per cent. of her salary to this fund, thus earning her right during all this time to come upon the fund when, according to the scheme, upon her becoming disabled by permanent infirmity of mind or body she would be entitled to do so. The other numerous subscribers to the fund, who it is said amount to some 10,000 persons, were in like position as the plaintiff, the subscriptions of all going in aid of those who became incapacitated.

I find that during this period as from 1889 to 1897, 7175*l.* has been paid by way of superannuation allowances to teachers and officers of the school board when disabled; that allowances are continuing to be so paid; and that upon March 25, 1897, this fund had a balance in hand of 94,861*l.*

That the plaintiff has for years voluntarily contributed to this fund, and acquiesced in its being managed and the fund applied as it has been, is beyond dispute.

If the plaintiff were in a court of equity, what right would she have, after this acquiescence, to demand back her subscriptions, which have been and are being dealt with in the way she has always desired, to the prejudice of the other subscribers who desire to continue to subscribe thereto and thus be protected in case of becoming disabled? She could have no such right after her acquiescence if she were in a court of equity. If

(1) [1891] 2 Q. B. 281. (2) [1892] 2 Q. B. 662.

she goes into a court of law as she has done, and seeks to recover back her subscriptions as money had and received, which cause of action is applicable when the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt a receipt by the defendant to the use of the plaintiff (per Lord Mansfield, *Moses* v. *Macferlan* (1)), what must she prove? She must prove that she handed the money she seeks to recover back to the defendants for a purpose, and that they have not applied it to that purpose, and that there has therefore been a total failure of consideration at the time she brings her action. This she cannot prove for it is not the truth, for during all the time she has been a subscriber to the fund she has had the right to a grant according to the provisions of the scheme. Upon these grounds this action fails, as does also the action of *Cockerton* v. *London School Board.*

If the plaintiff can establish that the school board by reason of being the creation of statute cannot in the circumstances of the case administer the fund, it may be that the plaintiff by pursuing the proper course might obtain the appointment of a fit person for the purpose of administering the fund, or it may be that she might obtain a distribution of the fund between the different contributors according to their respective interests therein; but though I offer no opinion thereon, she cannot maintain an action for money had and received to get back the subscriptions she has voluntarily for years subscribed to the fund, and which up to action brought have been and were being applied to the very purposes for which she made her subscriptions, and during all which time she has had the right of participation in the scheme according to its terms and conditions, nor can she bring an action for arrears of salary, for no arrears exist.

In my judgment the appeals in both actions must be dismissed.

RIGBY L.J. read the following judgment:—The plaintiffs in these actions, Miss Phillips and Mrs. Cockerton, were formerly

(1) (1760) 2 Burr. 1005.

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teachers in the employment of the School Board for London, and each of them brought her action in the county court for Westminster for the recovery, either as money had and received or as unpaid salary, of sums amounting to 2 per cent. on the total annual amount of their respective salaries, deducted each year during their employment, as contributions made by them to a superannuation fund arising from subscriptions made by officers of the school board.

The county court judge dismissed both actions, and his decision was confirmed by a Divisional Court, consisting of Wright and Kennedy JJ. Each of the plaintiffs appealed on leave given by the Divisional Court, and the appeals were argued together.

The grounds on which the appeals were rested were substantially as follows: that the superannuation scheme, in furtherance of which the contributions of 2 per cent. were made, was in the nature of an insurance business carried on by the school board; that the carrying on of such a business by the board was illegal, as being ultra vires; that every part of the scheme was rendered illegal as being ancillary to the main illegal scheme; and that there was as a consequence a total failure of consideration, entitling each plaintiff to a return of her contributions.

On March 24, 1893, the School Board for London, through their clerk, sent to their officers and teachers, in the form of a series of resolutions numbered 1 to 8, a superannuation scheme with provisions for putting it into operation.

The following resolutions, and parts of resolutions, are all that seem material for the purposes of these appeals.

"1. That every officer appointed on and after the 25th of March, 1893, be appointed subject to a deduction of 2 per cent. from his or her salary, the amount so deducted to be carried forward to the account of the superannuation fund.

"2. That every teacher now in the service of the board be given the option until the 25th of March, 1893, of joining the superannuation fund, subject to the condition stated in resolution 1. . . . .

"4. That in the case of every teacher now in the service of

the board who is not desirous of joining the superannuation fund under the conditions contained in resolution No. 2, the amounts already contributed to the fund be repaid together with its accumulated interest, less the deduction of actual management expenses, upon condition that a receipt is given abandoning all further claims upon the fund.

"5. That the board adhere to the following resolution of the 31st of March, 1892,

'That the board should continue their application to Parliament for authority (*a*) to defray the expenses of the management of the superannuation fund, and (*b*) to guarantee the safe keeping of the same,'

but will make no contribution to the benefits or ensure the solvency of the funds.

"6. That pending the receiving of Parliamentary powers the board administer the superannuation fund upon the advice and recommendation of a committee of superannuation, consisting of members of the board, and representatives of the various sections of the officers of the board.

"Also that for future applications for superannuation the scale of benefits prescribed by the following resolutions [here the then existing resolutions as to superannuation allowances are set forth] be suspended until aforesaid Parliamentary powers have been obtained, and that the committee of superannuation be empowered, after actuarial advice has been taken, to substitute therefor such a scale of benefits as the fund is able to provide, and shall, upon receipt of such Parliamentary powers, further review the new state of circumstances in reference to the contributions and benefits.

"7. That the superannuation scheme constituted under the foregoing resolutions be put into operation as from the 25th of March next for all officers of the board who shall at that date be entitled to claim superannuation allowances under the above resolutions, and that it be referred to the finance committee to carry out this and the preceding resolutions.

"8. That the committee on superannuation be constituted as follows: The chairman of the board ex officio; five representatives to be elected by the board; five representatives to be

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elected by subscribers to the fund, namely, one head teacher to be elected by the head teachers; three assistant teachers, one at least of whom shall be an assistant mistress, to be elected by the assistant teachers; one member of the non-teaching staff to be elected by the non-teaching staff."

As might be gathered from the above resolutions, a superannuation fund had already been set on foot by the board, and resolutions with reference thereto had from time to time been passed by the board, but since both the appeals before us are concerned only with the superannuation scheme constituted under the resolutions above set forth, it is not necessary to refer to the terms of any earlier resolutions. All subscribers to the existing fund to whom these resolutions were sent were requested to exercise the option (i.) of joining the superannuation fund under the conditions stated in resolution No. 2; or (ii.) of withdrawing their contributions to the fund on the terms prescribed in resolution 4.

The plaintiff in the first action, who had already subscribed to the superannuation fund, elected to join the fund under the conditions stated in resolution 2, and thus voluntarily submitted during the time whilst she continued to be a teacher to the deduction from her salary of 2 per cent., in accordance with resolution 1.

The plaintiff in the second action was appointed after March 25, 1893, and, therefore, fell, without the exercise of any option on her part, within the operation of resolution 1. Each plaintiff ceased to be a teacher before bringing her action. The deductions were regularly made from the salaries of both appellants whilst they continued to be teachers, but neither of them received or ever became entitled to receive any payment out of the superannuation fund.

Turning now to the consideration of the superannuation scheme set forth in the resolutions in order to determine the relations of the respective appellants to the school board and the other subscribers thereto, if the school board, as contended for the appellants, undertook the duty of insuring them against certain risks, and has carried on the business of insurance, a business which certainly is not within the powers of the school

board, a grave question might arise. But a careful examination of the resolutions shews these contentions to be unfounded. The school board in the case of the first appellant invite, and in the case of the second appellant impose as a condition of her employment, a subscription to the superannuation fund, but enter into no contract of insurance in either case. By the express terms of resolution 5 they made it plain that they would not contribute to the benefit of the fund, or even insure its solvency. It is true that by s. 6 they undertake the duty of administering the fund in the limited manner pointed out by that resolution. It is also true, as was pointed out in the argument, that they have allowed their paid officers to devote a portion of their time towards the service of the fund, and have incurred certain expenses in relation to the working of it; but there is nothing in the scheme to indicate that they intended to take any obligation upon themselves in regard to any such last-mentioned matters.

It may be, however, that the undertaking of the duty of administering the fund in the manner pointed out in resolution 6, or in the manner in which that obligation has been interpreted in practice, was a matter ultra vires the school board. It does not appear necessary now to decide any such question, since it may for the purposes of this case be assumed, without actually deciding it and without affecting the actual conclusion arrived at, that in the matters now referred to the board was acting ultra vires. This action of theirs would, however, in no way alter the essential nature of the superannuation scheme, which was the creation by the subscribers themselves of a fund which was to supply, in accordance with the directions of the superannuation committee, all the relief to which any subscriber could ever be entitled. The insurance scheme was, in fact, in the nature of a mutual insurance, and not an insurance by the board at all. The scheme was not originated in order that the board might administer it; but the administration by the board was ancillary to and not really necessary for the purposes of the scheme. If the board were restrained from administering the fund, the main purposes of the scheme could still be carried out successfully. It would be

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unreasonable to hold that the whole scheme failed because a subsidiary, and so far as the real objects of the scheme an unessential, and even it may fairly be said an unimportant, part of it could not be carried out without a departure by the school board from their statutory powers. If the school board could not properly act as trustees, the remedy would be, not to declare the trust invalid, but to appoint other trustees. The Court never permits a trust to fail for want of a trustee. Independently of the question of ultra vires, there could not be any ground for granting the plaintiff the relief claimed. Each subscriber paid his or her contribution to the fund for a purpose common to him or her and all other subscribers. The whole fund, by agreement of all the subscribers with one another, became liable for the payments which, under the advice and directions of the superannuation committee, might become payable to those of them whose expectation of benefit ripened into actual claims. It would be wrong to say that subscribers who received nothing from the fund had no consideration for their contributions. It was, of course, well known that some of them would never earn a superannuation grant; but that fact lies at the root of every scheme of mutual insurance. Those who do not earn a grant help to pay those who do, and it is the possibility of a grant, and not the grant itself, which forms the true and sufficient consideration for the contribution.

No difference arises between the cases of the two plaintiffs. Miss Phillips, as already stated, voluntarily elected to contribute to the fund. Mrs. Cockerton, coming in under resolution 1, could not, owing to the rule laid down, exercise any option. There appears to be no sufficient reason why, in fixing the remuneration of a teacher, the school board should not stipulate that 98 per cent. only should be paid in cash, and the remaining 2 per cent. by way of contribution for the benefit of the teacher to the superannuation fund, which was, in substance, what was done here.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree that both these appeals ought to be dismissed. I have

really very little, if anything, to add to the judgment of Wright J. I do not feel at all satisfied that the school board have done anything ultra vires. Sect. 35 of the Elementary Education Act, 1870, empowers the school board to appoint officers and teachers to hold office during the pleasure of the board, and to assign them such salaries or remuneration as they think fit. I see nothing in these words to prevent the school board, if they think that they will get better service thereby, making it a condition of service that the officers and teachers shall take their remuneration partly in deferred salary, and that this part of the salary so deferred shall be devoted to a superannuation fund. The board may well think that officers and teachers who are willing to devote a portion of their remuneration to prudent provision for the future will be likely to render better service to the board. Assuming this view to be correct, that the board may make this condition in respect of the remuneration which they assign, I cannot see that it is ultra vires in the board to take upon themselves the duty of administering the superannuation fund, or to employ the clerical staff of the board, at the expense of the board, for the purpose of administering the fund. The whole thing seems to me incidental to the employment and remuneration of the staff. The fact that the board has chosen to apply for Parliamentary powers does not make that ultra vires which in itself is not ultra vires. No question arises as to guaranteeing the fund because the board have not done this. I also agree that neither Phillips nor Cockerton can recover from the board, even assuming that the board has done that which is ultra vires, moneys which with their consent have been paid to a fund to which other persons have subscribed upon the basis of mutual subscription.

Appeals dismissed.

Solicitors for plaintiffs: *Baker & Nairne.*
Solicitor for defendants: *C. E. Mortimer.*

A. M.

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July 2, 4.

[IN THE COURT OF APPEAL.]

PARR'S BANKING COMPANY, LIMITED *v.* YATES.

Statute of Limitations—Continuing Guarantee—Interest—Appropriation of Payments—Banking Account—Interest converted into Principal.

In an action on a guarantee it appeared that the defendant had guaranteed to the plaintiffs, a banking company, payment of all moneys which might be owing to them in account with a customer with interest, commission, and other banking charges; and it was provided that the guarantee should be a continuing guarantee, and should not be withdrawn except by six months' written notice from the guarantor. The plaintiffs made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, and the customer paid sums in to his account with the bank against his liability from time to time down to a period within six years before the action. At the end of each half-year the plaintiffs debited him in account with the interest for the half-year on the amount owing by him from time to time, and carried forward the balance to his debit as the amount owing at the commencement of the next half-year:—

Held, that the plaintiffs' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitations, but that the action was maintainable in respect of interest which had accrued due from the customer within six years before the action and had not been paid.

The rule with regard to the appropriation of payments by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account which according to the practice of bankers has been from time to time converted into principal.

Appeal from the judgment of Bruce J. at the trial before him without a jury.

The action was brought to recover the sum of 1000*l.* upon a guarantee, which had been given to the plaintiffs, a banking company, by the defendant to secure the overdraft of a customer of the plaintiffs named McLaren.

The guarantee, which was contained in a letter to the plaintiffs signed by the defendant in February, 1887, was, so far as material, in the following terms: "In consideration of your agreeing at my request to come under advances or liabilities to or for D. McLaren (the guaranteed party) in account current with you, on condition that I should give this guarantee, I undertake to

guarantee to you the due payment and satisfaction of all moneys and liabilities that may have been, or may from time to time be owing to or incurred by you, in account with the guaranteed party, either solely or jointly with any other person or persons, with interest, commission, and other banking charges; and this shall be a continuing guarantee, and shall not be withdrawn except at the expiration of six calendar months from the day of written notice being given by me to you for that purpose; but the amount ultimately recoverable hereunder shall not exceed 1000*l.* with interest thereon from the day upon which the same shall be demanded from me until paid."

During the years subsequent to the giving of the guarantee down to the end of 1890 the plaintiffs from time to time made advances to McLaren by honouring his overdrafts, and he from time to time paid moneys in to his account with the plaintiffs with which he was credited, the balance however being always against him. At the end of each half-year the plaintiffs debited his account in the usual way with the interest for the half-year on the amount from time to time owing by him, and commission, and carried forward the balance to his debit as the amount owing by him at the commencement of the next half-year. On December 31, 1890, the balance against him stood at 3247*l.* 14*s.* 5*d.* No advances were made by the plaintiffs to McLaren after that date, but he continued to pay sums into the bank from time to time on account of his liability down to March, 1897, and the plaintiffs continued to debit him with interest and commission every half-year in the same manner as before. There were likewise certain other banking charges to his debit which had accrued within six years before the action. There was evidence shewing that he had from time to time seen his pass-book, which shewed the manner in which the account was kept. On June 30, 1897, the amount owing by him to the plaintiffs was 1979*l.* 1*s.* 6*d.*

The writ in the action was issued on September 3, 1897.

The learned judge gave judgment for the plaintiffs for the full amount claimed. (1)

(1) The learned judge held on the evidence given at the trial that there had been within the six years before the date of the writ an account stated

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Joseph Walton, Q.C., and *W. F. K. Taylor, Q.C.* (*A. A. Tobin* with them), for the defendant. The plaintiffs' claim is barred by the Statute of Limitations. No fresh advances were made to the guaranteed party after the end of 1890, a period of more than six years before the date of the writ. It is well settled that the statute begins to run from the time when the action might first have been brought: *Reeves* v. *Butcher*. (1) It is submitted that a right of action on the guarantee accrued as and when each of the advances was made, and was not repaid by the principal debtor. At any rate, the right of action on the guarantee in respect of all the advances had accrued by December 31, 1890: *Henton* v. *Paddison*. (2)

With regard to the interest, no doubt interest accrued against the party guaranteed within the period of six years before the date of the writ; but interest is accessory to the principal, and it has been held that, where the principal debt is statute-barred, the interest falls with it: *Hollis* v. *Palmer*. (3) There is no case in which it has been held that interest could be recovered, notwithstanding that the right of action for the principal was barred, though there are many cases in the books in which, if such interest be recoverable, it could have been recovered—e.g. *Henton* v. *Paddison* (2); *Reeves* v. *Butcher*. (1) The guarantee only guarantees the interest as accessory to the claim for principal thereon. The claim for commission and banking charges stands on the same footing as that for interest, such charges being only accessory to the principal debt.

Assuming that the claim for interest accruing within six years before action does not fall with the principal debt, the payments made by the principal debtor in account with the plaintiffs are sufficient to satisfy that interest, and the rule with

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between the plaintiffs and McLaren, which gave the plaintiffs a fresh right of action against the latter for the whole of the balance then due from him as for money payable on an account stated, and consequently gave a fresh right of action on the guarantee: and on that footing it followed that the full amount of 1000*l.* was owing on the guarantee. The Court of Appeal held that the evidence did not shew such a statement of account, but the facts and arguments on that point are omitted from the report, as it involved merely a question of fact.

(1) [1891] 2 Q. B. 509.

(2) (1893) 68 L. T. 405.

(3) (1836) 2 Bing. N. C. 713.

regard to appropriation of payments is that, where both principal and interest are due, payments made generally on account must be applied first to the interest. In Lindley on Partnership, 6th ed. p. 235, it is laid down that "interest is presumed to be paid before principal."

[They cited on this point *Bower* v. *Marris* (1); *Thompson* v. *Hudson* (2); *Clayton's Case*. (3)]

Carver, Q.C., and *Horridge*, for the plaintiffs. The argument for the defendant treats this guarantee as if it were simply a guarantee of advances made by the plaintiffs to the party guaranteed; and the contention thereupon is that, as soon as each advance was made, a cause of action arose against the guarantor, and these are the causes of action now being sued on; and, consequently, as they did not arise within six years, the right of action is barred by the Statute of Limitations. But the proper construction of a guarantee such as this given to a bank is that it is a continuing promise to pay the amount which from time to time may be due upon the account from the principal debtor, if it be not paid by him. The amount claimed is still due from the principal debtor, there being no question of the Statute of Limitations so far as he is concerned, as he continued to make payments on account down to 1897. The defendant is now being sued for the balance to the debit of the party guaranteed which existed in 1897. The non-payment of that balance by the principal debtor is a fresh cause of action against the defendant upon the guarantee. There is a cause of action on this guarantee at any moment when the bank calls on the customer to pay the balance due from him, and he fails to do so.

The doctrine that interest, being an accessory to the principal debt, cannot be recovered if that is barred, even if well founded, does not help the defendant. The principal of the advances and interest are still due from the party guaranteed. The "interest" meant by the guarantee is the interest on the balances from time to time due from him on the account; it does not mean interest as accessory to principal due on the

(1) (1841) Cr. & P. 351. (2) (1870) L. R. 10 Eq. 497.
(3) (1816) 1 Mer. 585.

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guarantee: it means the items of fresh debt that accrue from half-year to half-year against the principal debtor as the consequence of the bank's forbearance to sue him. These items are guaranteed as well as the advances.

The rule relied upon by the defendant with regard to the appropriation of payments to interest before principal has no application to such a case as this. It applies, no doubt, as between mortgagor and mortgagee and in other similar cases. It applies in cases where there is a standing balance to a person's debit. But it does not apply to interest on a current account, which according to the practice of bankers, is from time to time added to the principal due.

Joseph Walton, Q.C., in reply.

A. L. SMITH L.J. I do not think the plaintiffs are entitled to retain the judgment which they have obtained for the full amount claimed upon this guarantee. The guarantee, which was given in February, 1887, was to be a continuing guarantee of the moneys owing to the plaintiffs by a customer upon his current account with them. Subsequently to the giving of the guarantee the account was operated upon by further drawings by the party guaranteed, and further advances were made to him from time to time down to the end of 1890. After that period no further advances were made to him, but interest on the amount standing to his debit and commission were from time to time charged against him, and he from time to time paid in sums against the amount of his liability to the bank. So things went on till June, 1897, when the amount owing by him to the plaintiffs was 1979*l.* 1*s.* 6*d.* The plaintiffs on September 3 following brought this action upon the guarantee to recover the amount remaining due from the guaranteed party upon the account, and the defendant in answer to the action sets up the Statute of Limitations. I am of opinion that as regards the moneys advanced the plaintiffs' action is not maintainable. I need not read the guarantee again. In the result I think that, upon the true construction of it, no advances having been made for a period of more than six years before the date of the writ in the action, the plaintiffs' right of

action in respect of the advances is barred by the Statute of Limitations. That however does not dispose of the case, because the guarantee was given not only in respect of sums advanced to the guaranteed party, but also in respect of interest, commission, and other banking charges. In my opinion, as interest, commission, and other banking charges, the payment of which is as much guaranteed by the guarantee as the payment of the advances, have accrued against the guaranteed party within the period of six years before the commencement of the action, the Statute of Limitations does not affect those items, and the plaintiffs are entitled to recover such interest, commission, and other banking charges as they can shew to have become due from the guaranteed party to them during that period, that is between September 3, 1891, and September 3, 1897. The doctrine that interest is an accessory which falls to the ground with the principal does not apply to a case like this, because the payment of interest, commission, and other banking charges due from the guaranteed party is as much guaranteed as payment of the sums advanced themselves. I do not think that the doctrine with regard to the appropriation of payments to interest before principal upon which the defendant relied has any application to the present case. The result is that the judgment of the learned judge in the Court below must be varied, and the plaintiffs must have judgment only for the amount due to them for interest, commission, and other banking charges which accrued within the period of six years before the action. (1)

RIGBY L.J. I agree. With regard to the applicability of the Statute of Limitations to the claim in respect of the principal sums advanced to the guaranteed party I have very little to add. As to all the items of charge down to the period of six years before the date of the writ it is clear that a right of action had at that period accrued to the plaintiffs upon the guarantee. That they did not choose to exercise it is immaterial. The

(1) Counsel stated that the parties would have no difficulty in agreeing on the amount for which judgment should be entered upon the principles laid down by the Court.

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right of action had then accrued; and the action in respect of those items is barred by the statute, because the cause of action did not accrue within six years before action brought. The counsel for the plaintiffs suggested a construction of the guarantee to which in the absence of authority in its favour I cannot assent. He sought to treat a guarantee of this kind as giving a fresh right of action from day to day, a construction which would render it impossible, so long as the debt remained recoverable from the principal debtor by the bank, for the guarantor to obtain the benefit of the Statute of Limitations. I do not think that the word "continuing" involves any such meaning. The effect of that word is to extend a guarantee beyond the first sum advanced to sums subsequently advanced, so long as the guarantee is continued.

With regard to the claim for interest and other charges, I think that the right conclusion on the language of the guarantee is that the interest and other charges due from the party guaranteed were intended to be guaranteed on the same footing as the advances made to him, and that "with interest" does not mean that the interest is only guaranteed as accessory to the guarantee of the principal; but the effect is that moneys due from the customer on the account, whether for principal or interest, shall be guaranteed. That being so, I think the plaintiffs are entitled to recover such interest, commission, and other banking charges as may have become chargeable against the party guaranteed within six years before action brought.

There is one point remaining with which I must deal. The defendant's counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract, and would be most unreasonable as against him. But I cannot think that this rule can have application as suggested to accounts like the account in this case, which is made out in the manner usual as between banker and

customer. Such a mode of making out the account is so far usual that I do not think the customer, or a guarantor of the customer, could object to it. I think one must assume that the understanding of all parties was that the account would be kept as between the person guaranteed and the bank on the usual principle with regard to such accounts—that is to say, by treating moneys paid in from time to time by the customer as a deduction from the general amount due from the customer in respect of the loan and interest thereon, and at the end of each half-year carrying over the debit balance to the next half-year as principal.

VAUGHAN WILLIAMS L.J. I agree. My view is that the cause of action on the guarantee arose as to each item of the account, whether principal, interest, commission, or other banking charge, as soon as that item became due and was not paid, and, consequently, the Statute of Limitations began to run in favour of the defendant in respect of each item from that date. I agree with what my brothers have said with regard to the claim for interest. I think that the interest stands on the same footing as any other item to the debit of the party guaranteed in the account; and that the defendant continues liable as guarantor in respect of interest which has accrued within six years before action, and does not get rid of that liability because his liability to be sued on the guarantee with regard to the principal has become barred by the Statute of Limitations. I also agree that there is no ground for saying that there is any rule which could apply the payments which have been made to the interest on the advances made to the party guaranteed as distinguished from the principal. According to the ordinary practice of bankers the interest due is from time to time added to the principal, and becomes itself part of the principal due.

Judgment varied accordingly.

Solicitors for plaintiffs: *Alfred Bright, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for defendant: *Day & Russell, for R. Yates, Liverpool.*

E. L.

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[IN THE COURT OF APPEAL.]

CORPORATION OF THE BOROUGH OF THETFORD *v.* NORFOLK COUNTY COUNCIL.

Local Government—County Council—Borough having Population under 10,000 *—Separate Court of Quarter Sessions—Liability for Costs of—Salary of Recorder—Fees of Clerk of the Peace—Salary of Clerk to Justices—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 35, 38, 84.

In the case of boroughs having a separate court of quarter sessions and commission of the peace, which contained according to the census of 1881 a population of less than 10,000, the Local Government Act, 1888, has not transferred the obligation of paying the salary of the recorder, the fees of the clerk of the peace, and the salary of the clerk of the borough justices from the borough to the county council.

Decision in *Ex parte Kent County Council and Council of Sandwich*, [1891] 1 Q. B. 389, and *In re County Council of Herefordshire*, [1895] 1 Q. B. 43, to the contrary, overruled.

Appeal from the judgment of Wills J. in an action tried by him without a jury.

The action was brought by the corporation of Thetford, a borough having a court of quarter sessions and a separate commission of the peace, the population of which was less than 10,000 according to the census of 1881, claiming, inter alia, a declaration that the county council of the county of Norfolk in which the borough was for the purposes of administration and government situated was liable to pay the salary of the recorder, and the fees of the clerk of the peace for the borough, and the salary of the clerk to the borough justices.

The facts and the arguments upon which the parties respectively relied appear sufficiently from the report of the case in the Court below. (1)

Crump, Q.C., and *Le Riche* (*Isaacs, Q.C.*, with them), for the plaintiffs.

Sir R. T. Reid, Q.C., and *W. Wills*, for the defendants.

Cur. adv. vult.

(1) [1898] 1 Q. B. 141.

July 25. A. L. SMITH L.J. read the following judgment:— The main question to be determined in this case is whether the corporation of the borough of Thetford or the county council of the county of Norfolk are liable to pay the salaries of the recorder of Thetford and of the clerk of the peace of that borough. There is also a question raised by cross-appeal as to the payment of the salary of the clerk to the petty sessions holden in and for that borough, which I will deal with separately.

There is no doubt that prior to the passing of the Local Government Act, 1888, the corporation of Thetford, which was a quarter sessions borough, was liable to pay the salaries of its recorder and clerk of the peace, and for that purpose might have recourse to the borough fund. The Municipal Corporations Act, 1882 (s. 140, and Sched. V., Part I.), is clear as to this, and it is wholly unnecessary to go back to the Municipal Corporations Act of 1835, or prior thereto, as we were invited to do by counsel. The sole point we have to determine as to the salary of the recorder and clerk of the peace is this: Has the Local Government Act, 1888, taken off the shoulders of the corporation of Thetford the obligation of paying its recorder and clerk of the peace, and transferred the obligation on to the shoulders of the county council of the county of Norfolk? This entirely depends upon what is to be found in the Local Government Act, 1888, and, without travelling into what I conceive to be matters irrelevant to what I have to decide, I will point out as concisely as I can how the matter stands.

By ss. 31, 35, and 38 of the Local Government Act, 1888, certain of the boroughs of England and Wales were divided into three classes. The first class consists of boroughs which contained a population of not less than 50,000 on June 1, 1888, or were counties of themselves. These are called "county boroughs." The second class consists of quarter sessions boroughs, not being county boroughs, which contained a population of 10,000 and upwards according to the census of 1881. These I will call the larger boroughs. The third class consists of quarter sessions boroughs which contained a population of less than 10,000 according to the census of 1881. These I

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will call the smaller boroughs. The borough of Thetford falls within this last class of boroughs. It is clear that the Legislature had a reason for splitting up these boroughs of England and Wales into these three classes, but why it did so is not for me to speculate upon or determine; it is sufficient to say that upon reading ss. 31, 35, and 38 of the Act of 1888 it is manifest that the Legislature has done so.

Now, as regards this first class of boroughs—i.e., the county boroughs—ss. 31–34 of the Act are made to apply to them, and to them alone. I have not to consider the why and the wherefore the special provisions of these four sections are made applicable to this class of boroughs and not to the other two classes of boroughs, but that they are so applied is clear, and I have nothing more to say upon this matter, especially as the borough of Thetford does not fall within this class.

I now come to the second class of boroughs, to which, and to which alone, s. 35 with all its sub-sections applies. This section commences: "In the case of a quarter sessions borough, not being one of the boroughs named in the 3rd schedule to this Act" (i.e., a county borough), "but containing according to the census of 1881 a population of 10,000 or upwards, the following provisions shall, on and after the appointed day, apply." Then come special and specific provisions applicable to this class of borough, and in my opinion to this class alone. By sub-s. 5 of this 35th section it is enacted: "The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough"—obviously, in my opinion, meaning the larger boroughs—"may be assessed to county contributions, and all costs of prosecutions mentioned in s. 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund." So far as this sub-s. 5 of s. 35 is inconsistent with s. 169 of the Municipal Corporations Act, 1882, it repeals it: see especially s. 126 of the Local Government Act, 1888. It is said that this sub-section relieves the larger boroughs from payment of their recorders and clerks of the peace. It may or may not do so. I have not to decide the point, for I have only to deal with the corporation of Thetford, which is not a larger but a smaller borough.

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I now come to what I have to decide, namely, whether, by reason of s. 38 of the Act of 1888, the corporation of Thetford is relieved from paying its recorder and clerk of the peace, and whether this burden is cast upon the county council of the county of Norfolk. Sect. 38, which has application to the smaller boroughs alone, is wholly dissimilar in its provisions to s. 35 of the Act which has application to the larger boroughs alone. Why the Legislature has determined to deal differently with these three classes of boroughs, as I have before said, it is not for me to speculate upon; it has done so. This s. 38 enacts that "Where a borough having a separate court of quarter sessions contained according to the census of 1881 a population of less than 10,000"—which is the case of Thetford—"(1.) there shall be transferred to the county council the powers, duties, and liabilities of the council and justices of the borough" relating to pauper lunatic asylums, to coroners, to analysts, to reformatory and industrial schools, to fish conservancy, to explosives, and also to the Highways and Locomotives Act, 1878. Power is given by this section for the council of the borough to apply to the county council to declare certain roads in the borough to be main roads. By sub-s. 5 of s. 38 it is enacted that "the area of the borough shall for the purposes of the above-mentioned Acts and all other administrative purposes of the county council be included in the county as if the borough had not a separate court of quarter sessions, and accordingly shall be subject to the authority of the county council and the county coroners, and may be annexed by the county council to a coroner's district of the county, and the parishes in the borough shall be liable to be assessed to all county contributions." The administrative purposes mentioned in the section have nothing to do with judicial functions of the borough. Administrative purposes are not judicial functions. It will be noticed that the salaries of recorders and clerks of the peace in s. 38, which deals with the smaller boroughs, are in no way touched or dealt with; they are left to be paid just as they were before the passing of the Local Government Act, 1888—i.e., by the corporations of the smaller boroughs. By sub-ss. 7 and 8 of s. 38 power is given to the council of any

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borough of less than 10,000 inhabitants according to the census of 1881 to petition Her Majesty to revoke the grant of a court of quarter sessions to the borough, and also to revoke the grant of a commission of the peace for the borough.

It was argued on behalf of the borough that the Legislature must have meant to place the payment of the salaries of the recorder and clerk of the peace of the smaller boroughs upon the county, because it had done so in the case of the larger boroughs (whether it has or not I do not decide), and because by sub-s. 5 of s. 38 Thetford, a smaller borough, is made liable to be assessed to all county contributions, and therefore it should be held that, if the transfer of the burden of paying the recorder and clerk of the peace to the county council cannot be found in s. 38 of the Act, which it clearly cannot be, sub-s. 5 of s. 35 must be pressed into the service and construed as a general provision not limited to the larger boroughs, as in my opinion it unquestionably is, and made applicable to the smaller boroughs as well. It is said, if this be not done, the Act would work injustice, and therefore this sub-s. 5 of s. 35 should be so read. With all submission to the late Stephen J. and to my brother Vaughan Williams, who, in the case of *Ex parte Kent County Council and Council of Sandwich* (1), held that sub-s. 5 of s. 35 was to be read as a general provision applicable to both the larger and smaller class of boroughs, I cannot agree. To hold so would, in my opinion, be doing such violence to the provisions and framework of the Act as no Court would be justified in doing, even if the suggested imputations upon the legislation be well founded, which I am by no means convinced of. The special provisions of sub-s. 5 of s. 35 applicable to the larger boroughs are in my judgment purposely omitted from s. 38, which is applicable to the smaller boroughs. The special provisions of sub-s. 5 of s. 38 are, as was pointed out by Sir Robert Reid, such as to tax the borough for the expenses of the county, and not the county for the expenses of the borough; and yet it is now said by the borough that the true reading of the Act is that the county should pay these expenses (salaries of recorder and clerk of the peace) of the borough. It is, too,

(1) [1891] 1 Q. B. 389, at p. 391.

significant that the Legislature in this s. 38 has given to the smaller boroughs an easy way out of these difficulties, if they do not desire to continue to pay their recorder and clerk of the peace when made liable to county contributions; for they may, under sub-s. 7 of s. 38, petition Her Majesty to revoke their grant of a court of quarter sessions, and also their grant of a commission of the peace. This right is not given, it will be seen, to the larger boroughs. As to the suggestion that the borough of Thetford is unable by reason of the Act of 1888 to pay out of its borough fund the salary of its recorder and clerk of the peace, I cannot find that it is well founded, and do not agree with it. The construction of s. 38 of the Act of 1888 appears to me to be clear, and, in my judgment, nowhere in that section nor anywhere else in the Act of 1888 can it be found that the obligation of the borough of Thetford to pay its recorder and clerk of the peace has been taken from the borough and transferred to the county council of Norfolk. Sect. 36 in no way deals with the liability of a corporation and has no bearing on this case. I agree with my brother Wills that the liability of the corporation to pay its recorder and clerk of the peace has not been transferred by the Act of 1888 to the county council, and I am of opinion that the appeal of the corporation of Thetford from his judgment should be dismissed.

I now come to the cross-appeal of the county council as to whether the borough of Thetford or the county council of the county of Norfolk is liable to pay the salary of the clerk of the borough justices in petty sessions holden in and for the borough of Thetford. My brother Wills has followed and agreed with the case of *In re County Council of Herefordshire* (1), wherein a Divisional Court held, following the case of *County Council of Cornwall* v. *Town Council of Truro* (2), which was a borough with a population of over 10,000, that the salary of the clerk to borough petty sessions had since the Act of 1888 to be paid by the county council, and not by the borough. The correctness of this decision is now challenged in this Court, and we have to say if it be rightly decided. The way in which it is said that the county council and not the borough is liable to

(1) [1895] 1 Q. B. 43. (2) (1894) 63 L. J. (M.C.) 60.

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pay the salary of the clerk to petty sessions of the borough is this. First of all, the Act of 1849 (12 & 13 Vict. c. 18), is referred to, which is "An Act for the holding of petty sessions of the peace in boroughs," not in counties. This Act, after reciting that "petty sessions of the peace are holden in and for certain divisions of the several counties of England and Wales, called petty sessional divisions, and important duties have lately been assigned to the justices attending at such sessions and to their clerks by certain Acts of Parliament, and it is desirable to declare and enact that the sittings of justices of the peace . . . . in and for every borough . . . . having a separate commission of the peace shall be deemed a petty sessions of the peace within the meaning of such Acts," enacts that "every sitting and acting of justices of the peace . . . . in and for any borough . . . . having a separate commission of the peace . . . . within England and Wales . . . . shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament already made or hereafter to be made, having relation to such petty sessions or to any business to be transacted thereat." It is not suggested that any Act prior to the Act of 1849 (12 & 13 Vict. c. 18) places the appointment and payment of a salaried clerk to a borough petty sessions in the county council, and it is not denied that prior to the passing of the Act of 1888 the borough appointed and paid the salaried clerk to its own petty sessions. It is, however, said that the Local Government Act of 1888 changes all this, and that s. 84 is the section which effects this. Sect. 84, sub-s. 1, of the Act of 1888 runs thus: "(1.) The salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore. (2.) The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local autho-

rity respectively." It is true that by the Act of 1849 the borough bench is made a petty sessional division—that is, so far as this is concerned, it is placed on a par with county petty sessions; but with what salaried clerks is s. 84 of the Act of 1888 dealing? Now it will be seen that s. 3, sub-s. (x.) of the Act of 1888, which is the transfer section to the county council, deals, amongst other things, with salaried clerks of county justices, but not with salaried clerks of borough justices. These clerks are not dealt with at all. Sect. 84 of the Act of 1888 also in my opinion deals with the salaried clerks of county petty sessional divisions, and not with the salaried clerks of borough petty sessional divisions, and for these reasons. Sect. 84 is part of a group of sections commencing with s. 83, which group is headed "officers." Sect. 83 refers to county and not to borough officers: this is clear. The joint committee (appointed under s. 30) mentioned in this section, as also in s. 84, is composed of an equal number of county justices and county councilmen. This committee cannot interfere with the judicial functions of a larger or smaller borough. Sect. 84, which follows s. 83, deals in my judgment with exactly the same class of salaried clerks as s. 83—i.e., salaried clerks of county petty sessional divisions, and not with salaried clerks of borough petty sessional divisions. The words "Every petty sessional division" in s. 84, according to the context and whole scope of the Act, mean in my opinion a county and not a borough petty sessional division. It will be seen that by s. 84, sub-s. 1, the appointment as well as the removal of the salaried clerk mentioned in the section is expressly left where this had been prior to the passing of the Act—that is, the appointment and removal of a county petty sessional salaried clerk is left with the county authority. If this sub-section applied to a borough petty sessions salaried clerk, which, I think, it does not, then the appointment and removal of a borough petty sessional salaried clerk is left with the borough authority. Sub-sect. 2 of s. 84 also appears to throw light upon this, for by it the joint committee, composed as above mentioned of county men, is introduced to deal with the "officers" mentioned in ss. 83 and 84. What has such a committee to do with

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a borough officer, to whose selection, appointment, and removal they are strangers, and advisedly kept strangers by the Act, though it is now said they are by reason of the Act to pay his salary? I do not see the object or sense of this, and, in my opinion, it is not the true construction of the Act. In my judgment, s. 84 of the Act of 1888 does not apply to borough petty sessions salaried clerks at all, and, therefore, does not shift the payment of such salaried clerks on to the county council. In my judgment, the corporation of Thetford is liable to pay the salary of its own clerk to its own borough petty sessions, as it was before the passing of the Act of 1888, and this obligation is not by the Act cast upon the county of Norfolk; and the case of *In re County Council of Herefordshire* (1) was not rightly decided; and, consequently, this appeal by the county council must be allowed. I have heard nothing about a point apparently taken in the Court below, but not taken here, as to the salary of the clerk of the justices acting as visitors of licensed houses for lunatics in the borough of Thetford, and I therefore say nothing about it. As the county council has succeeded in this appeal and cross-appeal, first as respondents, and secondly as appellants, they must have their costs of each appeal both here and below.

RIGBY L.J. read the following judgment:—This action was brought by the mayor, aldermen, and council of the borough of Thetford against the county council of Norfolk to obtain a declaration that the defendants are under an obligation to pay and are liable for the costs and expenses of the quarter and petty sessions of the borough, including the salary of the recorder, and the fees of the clerk of the peace, and the salary of the clerk to the borough justices, and other expenses which seem to fall within the description of expenses of the justices' room. The borough of Thetford is a quarter sessions borough of the class hereinafter referred to as smaller boroughs.

Under the Municipal Corporations Act, 1882, all the above sums were payable by the borough treasurer out of the borough fund: the salaries of the recorder and clerk of the justices

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without any order of the council, and the fees of the clerk of the peace and the expenses of the justices' room by order of the council: see s. 140 and the 5th schedule to the Act.' As the borough fund is made up in part of the corporate income arising from land and valuable securities (s. 139), and, if insufficient for the purposes to which it is applicable, is to be supplemented by a borough rate to be made by the council (s. 144), the liability to the above-mentioned payments may, in a sense, be spoken of as a liability of the corporation or of the council; but it is important to observe that such payments cannot constitute in any sense a liability of the quarter sessions or the justices of the borough, who have nothing whatever to do with the payments. The contention of the plaintiffs is that the above liabilities are transferred to the Norfolk County Council by the operation of the Local Government Act of 1888. That Act deals with a very complicated subject-matter, and great care is required in dealing with the different parts of it, but the construction is greatly facilitated by the way in which it is divided into separate parts. Part I., consisting of ss. 1 to 30 inclusive, is headed "County Councils." Part II. is headed "Application of Act to Boroughs, the Metropolis, and certain Special Counties." The first sub-division of this part is headed "Application of Act to Boroughs." This sub-division comprises ss. 31 to 39 inclusive; but there is a clear further sub-division by virtue of which the operation of the different sections is limited in manner hereinafter stated, ss. 31 to 34 inclusive being made to apply exclusively to what are called county boroughs, which are named in the 3rd schedule to the Act, s. 35 exclusively to quarter sessions boroughs of a population of 10,000 or upwards, hereinafter referred to as larger boroughs, s. 36 to the general application of the Act to boroughs having a separate commission of the peace, whether quarter sessions boroughs or not, s. 37 exclusively to quarter sessions boroughs to be created after the passing of the Act, s. 38 exclusively to quarter sessions boroughs of a population of less than 10,000, hereinafter called smaller boroughs, and s. 39 to boroughs, whether quarter sessions boroughs or not, with a population of less than 10,000. The express words confining

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the operation of these several sections to the different classes of boroughs referred to in them respectively are so clear and precise that nothing less than express words equally clear or language raising a necessary implication can justify us in extending the respective provisions of any of the sections to boroughs not referred to in them.

Now, the above analysis shews that the only sections of Part II. which apply to the smaller boroughs, of which Thetford is one, are ss. 36, 38, and 39, and in those sections, and those only so far as Part II. is concerned, ought to be found the materials for answering the questions raised in this action.

Now, in s. 36 we find it enacted that, subject to the provisions of the Act, all such powers, duties, and liabilities of the court of quarter sessions or justices of the borough, as in the case of the county are by the Act transferred to the county council, shall cease, and the county council is to have those powers, duties, and liabilities within the area of the borough as in the rest of the county. The reference to powers transferred in the case of the county to the county council carries us back to s. 3 of the Act, where we find that the subject-matter of the transfers is the administrative business of the justices of the county in quarter sessions assembled, explained in the section to mean all business done by the quarter sessions, or any committee appointed by the quarter sessions, in respect of the several matters mentioned in the sub-sections numbered (i.) to (xvi.) inclusive. There are other provisions as to transfer of business to the county council, but none that in any way affect the present question. It is sufficient to observe that the business transferred is administrative business as distinguished from judicial business, and that the only transfers are of powers, rights, and liabilities of quarter sessions and justices of the borough; so that by this, the main section dealing with transfers of powers, duties, and liabilities, cannot be transferred the liability to payment of the salaries and expenses in question, as such payment was not before the passing of the Act a liability either of the quarter sessions or justices of the borough, but of the borough fund.

Sect. 37 applies only to quarter sessions boroughs to be created in the future; but it may be observed in passing that it contains no provision for the payment by the county council of salaries now under discussion, though it leaves the liability of the parishes in the borough to be assessed for county contributions exactly as it was.

Coming now to s. 38, which specially deals with the application of the Act to the smaller boroughs, we find that by sub-s. 1 there is a transfer of the powers, duties, and liabilities not only of the justices, but also of the council of the borough, as regards asylums for pauper lunatics. Sub-s. 2 provides for the transfer of the powers, duties, and liabilities of the council of the borough as regards other specified matters not affecting the present question, but there is a special proviso that the transfer by this section (meaning the whole s. 38) shall not, save as respects the coroners, affect the powers, duties, and liabilities of the council of the borough under the Municipal Corporations Act, 1882. This very plain enactment seems to shew conclusively that the powers and duties of the council to order payment of the remuneration of the clerk of the peace and the expenses of the justices' room are not interfered with by s. 38. It would be strange if the payment of the salaries of the recorder and clerk of the justices were dealt with in a different manner; but it is plain that they are not dealt with at all. With the exception of sub-ss. 5 and 7, no other portion of s. 38 throws any light on the question before us. Sub-s. 5 enacts that the area of the borough shall for the purposes of the Acts before mentioned in the section (none of which touch the present question), and all other administrative purposes of the county council, be included in the county, and accordingly the parishes in the borough are to be liable to be assessed to all county contributions.

It was contended before us that the imposition by this subsection of contributions to, amongst other matters, the cost of county judicial business makes it inequitable that the boroughs should continue to pay for their own judicial business. It might not be difficult, if it were necessary, to suggest reasons why the double liability should have been imposed; but if the

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fact is, as it appears to be, that Parliament has imposed the new liability without taking away the old, we are not at liberty to criticise the justice of the legislation. At all events, sub-s. 7 has provided or pointed out a means of getting rid of the obligation to pay for the special judicial business of the borough if it should turn out to be too onerous.

It is reasonably clear that nothing in s. 39 affects the question before us.

The conclusion, therefore, is that those sections of the Act which specially refer to the smaller boroughs contain no transfer of the liability to make any of the payments in question in this action.

I have not thought it necessary to deal specially with the provisions of s. 35 of the Act, but I think it plain that there is no provision of that section which, either by express words or by necessary implication, is made to apply to the case of the smaller boroughs.

Coming now to the case of the salary of the clerk of the borough justices, that must depend, first, and in my opinion mainly, on the construction of the Act of 1849 (12 & 13 Vict. c. 18). Before the passing of that Act certain meetings of justices called petty sessions were held in certain divisions of counties called petty sessional divisions; but there were no petty sessions so-called in boroughs, and no borough or part of a borough formed a petty sessional division. Important duties had been assigned by certain Acts of Parliament to the justices attending at such county petty sessions and their clerks, but the provisions of these Acts did not apply to sittings of justices in a borough having a separate commission of the peace, or of a stipendiary magistrate taking the place of justices for the borough. It was in the preamble of the statute, after recitals to the effect above stated, further recited that it was desirable to declare and enact that the sittings of justices of the peace or of a stipendiary magistrate in and for any borough having a separate commission of the peace should be deemed a petty sessions of the peace within the meaning of such Acts, and with that object it was enacted that every sitting and acting of borough justices or of a stipendiary should be deemed

a petty sessions; and further, that the district for which the sitting should be held should be deemed to be a petty sessional division within the meaning of any Acts of Parliament then already made or thereafter to be made "having relation to such petty sessions or any business to be transacted thereat." In this quotation the words "such petty sessions" must necessarily mean the previously existing petty sessions, for to them only did the Acts already made apply; and besides, it would be unnecessary to provide that a borough sitting should be a petty sessions within the meaning of an Act having relation to borough petty sessions. It seems to me from the whole purview of this Act that the Legislature was not contemplating any financial or other change in the relation of counties and boroughs, but was dealing only with the duties and jurisdiction of borough sittings, and that the name of petty sessions of the peace was conferred upon the sittings, and that of petty sessional division on the area, only as a convenient way of ensuring that there might always be one and the same set of duties imposed on justices and their clerks within the boroughs and the county, and that, notwithstanding the generality of the language used, the Act should not be treated as bringing in a subsequent statutory provision altering the relation of a borough and the county, such as the transfer of a liability, where the subsequent provision is not a provision reasonably plain and sufficient. Here, independently of the Act of 1849, there could be no doubt that the Act of 1888 in itself produces no change.

If my interpretation of the Act of 1849 is correct, there is an end of the question. But, even supposing the Act of 1849 to apply, I think that the dealing in the Act of 1888 with the salaries of clerks of justices in petty sessional divisions is so far from being clearly applicable to clerks of the justices of boroughs that from the Act itself it may be gathered that only the salaries of clerks of county justices were being dealt with. In the first place, when once it is established that the liability for the other expenses of borough sessions is not affected by the Act, it would seem to be rather capricious legislation to single out the salaries of the clerks of borough justices for

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exceptional treatment. I have been unable to find in the Act, or in the nature of things, any reason for such an exception being made, though, of course, if it is made in plain language the plain intention of the Legislature must be followed. Sect. 84 of the Act of 1888 was, in the case of *In re the County Council of Herefordshire* (1), decided to have imposed upon the county council the duty of paying the salary of the clerk to the justices of a smaller borough within the administrative county. This conclusion might be right if s. 84 stood alone, and it were established that on the construction of the Act of 1849 that Act applies. Sect. 84 has, however, to be considered in connection with s. 83 and with s. 3, sub-s. (x.), and s. 30. Now, the whole of s. 3 deals, as is before pointed out, only with the administrative business of the county justices, and sub-s. (x.) deals with the salaries of any officers whose remuneration is paid out of the county rate other than the clerk of the peace and the clerks of the justices, which must here mean the county justices. This sub-section, therefore, has no operation so far as regards the salaries of the clerks to borough justices. Sect. 30 provides for the appointment of a standing joint committee, and when it mentions clerks of the justices it plainly refers only to clerks of the county justices, and in no way deals with the case of the clerk to the borough justices. It would be strange that the standing joint committee, on which the smaller boroughs have no sort of representation, should be left to deal with the clerks to the justices of those boroughs in any way. Sects. 83 and 84, which stand together under the title "Officers," are not referred to in any way in that part of the Act which is concerned with the application of it to boroughs, and are in no way connected with that part. Presumably, therefore, the officers dealt with in those sections (83 and 84) must mean "officers" of the county, and the presumption is confirmed when the terms of the sections are considered. Sect. 83 is plainly confined to the case of clerks of the peace and clerks or officers of the county council, and the standing joint committee appointed under s. 30 have jurisdiction under the section by virtue of the circumstance that the officers are concerned partly with the

(1) [1895] 1 Q. B. 43.

county council and partly with the county justices. Sect. 84, sub-s. 1, provides that the salaried clerk of every petty sessional division is to be from time to time appointed and removed as heretofore. Unless we get from the context, as I think we do, that the clerks here spoken of are county officers, this sub-section would, on the literal reading of the Act of 1849, include the clerks of borough justices, but as to them would be quite superfluous and inoperative. Sub-s. 2 contains, of course, the enactment relied upon; but the substitution of the standing joint committee for the quarter sessions and the local authority seems to me to point strongly to the conclusion that only clerks to county petty sessional divisions were being dealt with. It would, again, be apparently a capricious scheme of legislation to subject to the control of a committee containing no representative of a smaller borough officers who have no duties to perform with which the committee are concerned, and with whose appointment and removal the committee have nothing to do. My conclusion is that the salaries of the clerks to the borough justices are not dealt with by the Act.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree. I am fully satisfied that my decision in the *Dover and Sandwich Cases* (1) was wrong.

In order to avoid putting on the Local Government Act, 1888, a construction which I found a difficulty in thinking that the Legislature intended—that is to say, that the intention was to impose upon smaller boroughs not only the burden of double taxation, but also the obligation to recoup under s. 151 of the Municipal Corporations Act, 1882, the county the expense of prosecuting at assizes and maintaining and punishing prisoners committed to the assizes from the borough, which obligation is obviously a mere corollary to the exemption of the borough from the county rates contained in s. 150, which exemption is taken away by the express provisions of ss. 35 and 38 of the Act of 1888—I put a construction upon those sections which I am now satisfied they will not bear, but which I deduced from the absence in s. 38 of the words in s. 35 of reservation of

(1) [1891] 1 Q. B. 389.

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powers, duties, and liabilities of the councils of the larger boroughs (notwithstanding the larger boroughs having become a part of the county for the purposes of the Act), although the area of smaller boroughs did by sub-s. 5 of s. 38 become a part of the county, and deduced also from the fact that it was hardly contested before me that part at all events of sub-s. 5 of s. 35—namely, that part which made the costs of assizes and sessions a county purpose—was of general application outside larger boroughs.

With regard to the clerk to the justices for the borough, it seems clear that prior to the Act of 1888 such clerk was paid his salary out of the borough fund. It is contended that since the passing of that Act the payment of such salary must be by the county council by virtue of s. 84 of that Act, which provides—(1.) that the salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore; (2.) that the county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local authority respectively. It is said that the clerk to the borough justices comes within the words "salaried clerks of petty sessional divisions" in s. 84 of the Act of 1888 because it is enacted by s. 1 of the Petty Sessions Act of 1849 (12 & 13 Vict. c. 18) that every sitting and acting of justices of the peace for any borough having a separate commission of the peace shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament made or hereafter to be made having relation to such petty sessions or any business transacted thereat. I do not agree to this contention. In order to arrive at the meaning of "salaried clerks of petty sessional divisions" in s. 84 of the Act of 1888, one must look at the provisions of that Act, and ascertain whether the words refer to all such salaried clerks

whether to borough or county justices, or whether the words are limited to salaried clerks to county justices only. Now the first reference in the Act of 1888 to clerks to the justices is in clause (x.) of s. 3, the section which provides for the transfer to the county council of the administrative business of the justices of the county in quarter sessions assembled, and clause (x.) provides for the transfer to the county council of the appointment, removal, and determination of salaries of any officers whose remuneration is paid out of the county rate other than the clerk of the peace and the clerks of the justices. The clerks of the justices here spoken of are those whose remuneration is paid out of the county rate, and clerks to the borough justices did not at the date of the transfer to the county council fall within this category. Then s. 30 of the Act of 1888 provides that for the purpose of the clerk of the peace and the clerks to the justices and joint officers, and of matters required to be determined jointly by the quarter sessions and the county council, there shall be a standing joint committee of quarter sessions and the county council. It seems to me that the clerks of the justices here spoken of are clerks to the county justices; but the matter is somewhat complicated. At first sight it looks as if boroughs were represented on the standing joint committee, because s. 48, sub-s. 3, enacts: "Provided that where at the passing of this Act the police force in such liberty or franchise" (i.e., a liberty or franchise defined in sub-s. 1 of s. 48—namely, a liberty and franchise of a county wholly or partially exempt from county rate) "is under the control of the quarter sessions for such liberty or franchise, there shall be one police force for the whole administrative county under the county council, and the quarter sessions of such liberty or franchise shall appoint such number of the members of the standing joint committee under this Act as may be agreed upon by the county council, the quarter sessions of the county, and the quarter sessions of the liberty or franchise, or in default of agreement may be determined by a Secretary of State." But a quarter sessions borough with a population of under 10,000 does not seem to be wholly or partially free from contribution to the county rate. Then comes a part of the Act

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beginning at s. 83, and headed "Officers," which seems to me to deal only with clerks of the peace and the clerks to the justices excluded from the provisions of clause (x.) of s. 3, which deals with other "officers whose remuneration is paid out of the county rate." It is true that the term used in s. 84 is not "clerk to the justices," but "salaried clerk of every petty sessional division"; but I think that the whole of this part of the Act is dealing with officers whose remuneration is paid out of the county rate, and was so paid at the time of the transfer, and that s. 84 has no reference to clerks to borough justices.

Moreover, I doubt whether the Local Government Act, 1888, is an Act of Parliament having relation to petty sessions or any business transacted thereat; but I am not sure about this, and prefer to rest my judgment on the ground that in s. 84 "salaried clerk of every petty sessional division" includes only those clerks whose salary was payable at the date of the passing of the Act of 1888 out of the county rate.

If these salaries of salaried clerks ought to be paid out of the county fund, and are recoverable by the plaintiffs, I do not agree that the judgment ought to be limited to six months' salary; but I further think that, even if these salaries are payable out of the county rate, no action will lie by the plaintiffs for moneys which they voluntarily chose to pay, being under no mistake as to facts. But these questions do not arise unless these salaries are payable by the county council of the county.

Appeal dismissed and cross-appeal allowed.

Solicitors for plaintiffs: *Ford, Lloyd, Bartlett & Michelmore, for J. Houchen, Thetford.*

Solicitors for defendants: *Sharpe, Parker & Co., for C. Foster, Norwich.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1898
July 17.

NEW LONDON CREDIT SYNDICATE, LIMITED *v.* NEALE.

Bill of Exchange—Oral Agreement to Renew—Inadmissibility of Evidence—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 21, *sub-s.* 2 (*b*); *s.* 29, *sub-s.* 2.

Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible on the ground that its effect would be to contradict the terms of the written instrument.

Young v. *Austen*, (1869) L. R. 4 C. P. 553, followed.

APPEAL of plaintiffs from the judgment of Darling J. at the trial before him without a jury.

The action was upon a bill of exchange for 110*l.* payable three months after date by indorsees against acceptor, the bill having been indorsed to the plaintiffs by the drawers to whose order it was made payable. The acceptance had been given to the drawers by the defendant, who was the chairman of and interested in a company, in settlement of an action brought by them against the company. The defence set up was that, at the time when the bill was accepted, it was orally agreed between the drawers and the defendant that, if the latter could not meet it at maturity, the drawers would renew it. It was admitted by the plaintiffs, who had given value for the bill, that they had notice of the circumstances under which the bill was accepted, and that they consequently could not claim to stand in a better position than the drawers; but they contended that what took place between the drawers and the acceptor did not amount to a contract to renew the bill, and that, if it did, evidence of such an oral agreement was not admissible to vary the effect of the written instrument. The learned judge held that the evidence shewed that the negotiation of the bill by the drawers was in breach of good faith, and consequently the plaintiffs' title to the bill was defective,

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and they could not maintain the action. He therefore gave judgment for the defendant.

Isaacs, Q.C., and *Schwabe*, for the plaintiffs. It is not contended that the plaintiffs are holders in due course so as to have a better title than the drawers who indorsed the bill to them. The action therefore stands on the same footing as if it were brought by the drawers. But the action would be maintainable by the drawers. Sect. 21, sub-s. 2 (*b*), of the Bills of Exchange Act, 1882, which provides that the delivery of the bill may be shewn to have been conditional, or for a special purpose, and not for the purpose of transferring the property in the bill, is obviously inapplicable, for the bill was signed and delivered to the drawers as an effective instrument and for the purpose of transferring the property in it. Sect. 29 of the Bills of Exchange Act, 1882, is also inapplicable. That section deals with the question who is a holder in due course, and sub-s. 2 of the section, which will be relied on by the defendant and which provides that the title of a person who negotiates a bill is defective when he negotiates it in breach of faith, only applies in relation to that question. It really has no application where the indorsee is not suing as a holder in due course, but only on his indorser's title. A contemporaneous oral agreement (1) to renew a bill is not admissible in evidence even between immediate parties by reason of the rule that such an agreement cannot be admitted to contradict or vary a written contract. The contract imported by the bill is to pay it at maturity, and an agreement to renew the bill is inconsistent with that contract: *Young* v. *Austen* (2); *Abrey* v. *Crux*. (3) In *Maillard* v. *Page* (4) the agreement to renew the bill was in writing. Evidence has been admitted of an oral condition that the written agreement was, like an escrow, only to take effect in a certain event: see *Pym* v. *Campbell* (5); *Lindley* v. *Lacey* (6);

(1) They contended that what took place did not amount to an agreement; but this point involved no question of law, and therefore the facts and argument in relation to it are not given.

(2) L. R. 4 C. P. 553.
(3) (1869) L. R. 5 C. P. 37.
(4) (1870) L. R. 5 Ex. 312.
(5) (1856) 6 E. & B. 370.
(6) (1864) 17 C. B. (N.S.) 578.

Pike v. *Street*. (1) But the present case does not fall within that class of cases. The bill was accepted and intended to take effect according to its tenour as a bill of exchange upon delivery.

F. M. Abrahams, for the defendant. The agreement to renew the bill implied an agreement not to part with or negotiate it. Therefore the indorsement of the bill by the drawers to the plaintiffs was in breach of good faith, and the plaintiffs' title to the bill was in consequence defective. By s. 21, sub-s. 2 (*b*), of the Bills of Exchange Act, 1882, as between immediate parties and as regards a remote party other than a holder in due course, the delivery of the bill may be shewn to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. It is contended that in this case the delivery of the bill was conditional. By s. 29, sub-s. 2, the title of a person who negotiates a bill is defective within the meaning of the Act where he negotiates it in breach of faith. Consequently the plaintiffs cannot make a title to sue on the bill, it having been negotiated against good faith by the drawers. An agreement not to part with or negotiate the bill does not contradict the terms of the written instrument. The cases that have been cited, such as *Young* v. *Austen* (2) and *Abrey* v. *Crux* (3), were anterior to the Bills of Exchange Act, 1882, and the law there laid down must now be taken to be subject to the provisions of s. 21, sub-s. 2 (*b*), and s. 29, sub-s. 2, of the Bills of Exchange Act, 1882.

Isaacs, *Q.C.*, for the plaintiffs, was not called on to reply.

A. L. SMITH L.J. This is an action upon a bill of exchange by indorsees against acceptor, but it really may be treated as if it were an action by the drawers, for it is admitted that the indorsees stand in no better position than the drawers, as they had notice of the facts upon which the defendant relies. I do not disagree with the learned judge upon the conflicting evidence with regard to the conversation that took place between

(1) (1828) M. & M. 226. (2) L. R. 4 C. P. 553.
(3) L. R. 5 C. P. 37.

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the drawers of the bill and the defendant, that there was an agreement by the former that they would not part with the bill, and would renew it, if the defendant was not in a position to pay it at maturity. The question is whether that evidence was admissible. The bill is a written instrument by which the defendant undertakes to pay 110*l.* at the end of three months. It has been held over and over again, that evidence of a contemporaneous oral agreement is not admissible to vary the effect of such an instrument. If the evidence be to the effect that the document is only delivered as an escrow, or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case. This document was signed and handed over as a bill of exchange, but there was an oral agreement that at maturity it should be renewed, if the defendant required it. In other words, although the written document states that the bill is to be met upon a day certain, the parol evidence is that it is not to be then met. Nothing is more clearly settled than that evidence of such an agreement is not admissible. In *Abrey* v. *Crux* (1) Willes J. stated that to be the law as established by the cases of *Hoare* v. *Graham* (2) and *Young* v. *Austen*. (3) It was argued by the defendant's counsel that the law as laid down in those cases is altered by the Bills of Exchange Act, 1882. I do not think that it was intended by that Act to alter the general law of evidence which renders parol evidence inadmissible for the purpose of contradicting the terms of a written document. The defendant's counsel relied on the terms of s. 21, sub-s. 2, and s. 29, sub-ss. 1, 2, of the Bills of Exchange Act, 1882. He urged that the plaintiffs had notice of a defect in the title of the drawers, because they knew that the bill was negotiated in breach of faith. But, assuming that s. 29 has any application to such a case as this, the only way in which a breach of faith could be shewn in this case is by shewing a breach of the contemporaneous oral agreement, and by the rules of evidence that is inadmissible. For these reasons I am of opinion that the appeal must be allowed and judgment entered for the plaintiffs.

(1) L. R. 5 C. P. 37. (2) (1811) 3 Camp. 57.
(3) L. R. 4 C. P. 553.

RIGBY L.J. I am of the same opinion. It is a wholesome rule of law that, when parties have put an agreement into writing, parol evidence is not admissible to contradict, or vary the terms of the written agreement. There are certain cases which may conveniently be called "escrow" cases where the question is whether the written agreement has ever become an effective agreement, or whether it was only to have effect as an agreement upon some condition being fulfilled which has not been fulfilled. This is not a case of that kind.

VAUGHAN WILLIAMS L.J. I agree. For lawyers practising under the old system of pleading there was a convenient test in these cases as to whether the oral evidence which it was sought to give was admissible. If the evidence were such as would support a plea of the general issue in an action of contract, like non est factum, that is to say, if it amounted to shewing that, though the defendant signed the instrument, he signed it on the understanding that it should not be an effective instrument until some condition was fulfilled, then it was admissible.

Appeal allowed.

Solicitors for plaintiffs: *Eldred & Bignold.*
Solicitor for defendant: *G. Boyd Wickes.*

E. L.

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1898
July 1.

[IN THE COURT OF APPEAL.]

ADLINGTON *v.* CONYNGHAM.

Practice—Appeal for Costs—Costs in Discretion of Judge—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Costs of Examination as to Debtor's Means and of Garnishee Proceedings—Orders* XLII., *rr.* 32, 34; XLV., *r.* 9.

The plaintiff, having obtained judgment and being unable to obtain payment of his debt, obtained, under Order XLII., r. 32, an order to have the debtor examined as to his means. The debtor on his examination admitted having a retiring pension and a balance at his bankers. The plaintiff then obtained a garnishee order against the bankers, and by that means recovered part of his debt. He then applied for his costs of the examination proceedings and of the garnishee proceedings. The master refused to make any order, on the ground, as was stated by affidavit, that the practice in the Queen's Bench Division was to treat such proceedings as a luxury, the costs of which the plaintiff could not throw on the defendant. The plaintiff appealed; the judge in chambers dismissed the appeal, as was stated, on the same ground, and refused leave to appeal. The plaintiff applied to the Court of Appeal, who gave leave, and he then appealed against the order in chambers.

Held, that as by the express terms of the Judicature Act, 1873, s. 49, no appeal will lie from any order as to costs which are left to the discretion of the Court except by leave of the judge making such order, and the costs in question were, by the terms of Order XLII., r. 34, and Order XLV., r. 9, in the discretion of the judge, the appeal must be dismissed, though the Court stated their inability to understand the practice alleged to exist in the Queen's Bench Division that examination of a debtor as to his means, and proceedings to attach debts due to him, were luxuries the costs of which the debtor ought not to be called on to pay.

THIS was an action by the holder of a bill of exchange against the acceptor. The master gave leave to defend, but on appeal to a judge this order was discharged, and leave given to the plaintiff to sign judgment under Order XIV., r. 1, for 101*l.* 5*s.* 2*d.* and taxed costs. Judgment was signed on October 13, 1897.

The defendant not having paid anything, an order was made on March 29, 1898, under Order XLII., r. 32, for an examination of the defendant as to his means. On May 2, 1898, the defendant was examined, and admitted that he had a retiring

pension of 550*l.* per annum, and had a balance of 30*l.* at his bankers. On May 3, 1898, the plaintiff obtained a garnishee order against the defendant's bankers that all debts due from them to the defendant should be attached to answer the judgment; and the garnishees were ordered to attend on an application by the plaintiff that the garnishees should pay the debt due from him to the defendant, or so much as might be sufficient to satisfy the judgment. On May 10, 1898, it was ordered that the bankers should pay to the plaintiff the debt due from them to the defendant (which turned out to be 72*l.* 16*s.* 2*d.*), less 1*l.* 11*s.* 6*d.* garnishees' costs. On June 6, 1898, the plaintiff took out a summons for an order that the costs of the plaintiff of the application for the examination of the defendant as to his means and consequent thereon, and the like costs of and consequent upon the two garnishee orders of May, 1898, and of the present application, should be taxed and paid by the defendant. The managing clerk of the plaintiff's solicitors deposed that he attended before the master on this application on June 9, and that the defendant's solicitors who attended urged that the proceedings, the costs of which were sought to be cast upon the defendant, were a luxury which the plaintiff usually had to bear; that the master adopted this view, and refused to make any order. On June 13 an appeal from this decision was heard by Channell J. in chambers. The same managing clerk deposed that the judge asked him whether he agreed with the statement that the master had said it was not the practice to allow these costs, and that he replied that the master had agreed with the defendant's proposition that the proceedings were a luxury which the plaintiff usually had to bear, and that the judge thereupon dismissed the appeal and refused to give leave to appeal.

The plaintiff thereupon applied to the Court of Appeal for leave to appeal, and on June 20 the Court (A. L. Smith, Rigby, and Vaughan Williams L.JJ.) gave leave to appeal.

H. Nield, for the appeal.

S. A. T. Rowlatt, for the defendant, took the preliminary objection that the judge whose order was appealed from had

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given no leave to appeal: Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 49; and that leave given by the Court of Appeal could not be substituted for it.

H. Nield, for the appeal. By Order XLII., r. 34, the costs of the examination as to means are in the discretion of the judge; and by Order XLV., r. 9, the costs of and incidental to the garnishee orders are in the like discretion. Here the judge has exercised no discretion, but has simply followed a practice which he understood to exist. In *Ex parte Waddell* (1) an appeal for costs was allowed. A decision relating to costs may be subject to appeal if it involves a question of law and principle: *In re Rio Grande do Sul Steamship Co.* (2) In the case of *The City of Manchester* (3) an appeal for costs was allowed.

[LINDLEY M.R. The appeal there was not as to costs only.]

In *Cockle* v. *Treacy* (4) it was held that an appeal would lie as to costs where they had been withheld, not on account of the conduct of the party, but by reason of the application of a supposed rule of law.

The respondent was not called upon.

LINDLEY M.R. I do not see how to get over the clear and express terms of s. 49 of the Judicature Act, 1873. That section says: "No order made by the High Court of Justice or any judge thereof, by the consent of parties, or as to costs only which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." No exception is made of cases involving a question of law or principle, nor is any reference made to the discretion of the judge having been exercised, and I do not see how to get over the plain words. The appeal, therefore, must be dismissed. I do not say anything as to the supposed practice about costs in such cases, but if in the Queen's Bench Division there is such a rule as alleged, I cannot understand it. Why these proceedings should be called a luxury passes my comprehension.

(1) (1877) 6 Ch. D. 328.
(2) (1877) 5 Ch. D. 282.
(3) (1880) 5 P. D. 221.
(4) (1896) 2 Ir. Rep. Q. B. 267.

CHITTY L.J. These costs were in the discretion of the judge, and so by s. 49 of the Judicature Act, 1873, no appeal will lie from an order relating to them without the leave of the judge who made the order, which leave he has refused to give. I cannot, however, understand the rule of practice which is said to prevail in the Queen's Bench Division to treat these proceedings as a luxury, the costs of which cannot be claimed from the opposite party. I cannot look upon it as a luxury for a judgment creditor who cannot get his debt paid to take the only proceeding by which he has any prospect of obtaining payment.

Appeal dismissed.

Solicitors: *Nye, Moreton & Clowes; Woodcock, Ryland & Parker.*

H. C. J.

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In re STEVENS. *Ex parte* BOARD OF TRADE.

Bankruptcy—Discharge—Misdemeanour — Refusal of Discharge — Power to otherwise determine—"Special Reasons"—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 2.

In cases coming within the words in s. 8, sub-s. 2, of the Bankruptcy Act, 1890, "Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, unless for special reasons the Court otherwise determines," if any order is made other than an order absolutely refusing the discharge, sufficient special reasons for the determination of the Court must exist, and should be stated in the order.

APPEAL by the Board of Trade (1) from the order of the judge of the county court at Birmingham.

On the hearing of the bankrupt's application for an order of discharge, the judge had before him the report of the official receiver, which stated that the bankrupt had been convicted under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-ss. 14, 15, of having, within four months next before the presentation of a bankruptcy petition against him, obtained

(1) Under the Bankruptcy Rules, 1886, 1890, r. 237.

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property on credit, on the false pretence of carrying on business, and disposed of, otherwise than in the ordinary way of his trade, property obtained on credit and not paid for, and had been sentenced to six months' imprisonment. The order made was that the discharge of the bankrupt be suspended for two years, and stated that it was made "for the following special reasons,—viz., that the jury strongly recommended the bankrupt to mercy." In delivering judgment the county court judge used the following words: "so to speak, he has paid for his sin, for it was a sin; he has suffered imprisonment." The judge afterwards added a written note, which was before the Court on the hearing of the appeal, in explanation of his judgment, stating that he had come to the conclusion, with regard to the bankrupt, "that the offences for which he was properly convicted and punished were the results more of confusion and distress than of deliberate fraudulent intent, and that he was thoroughly penitent, and intended to do his best to work in the future, and to pay his creditors if he could. Also I was informed at the bar, and all the parties agreed (not requiring strict proof), that the jury strongly recommended him to mercy." The Board of Trade appealed, on the ground that, as no special reasons for the determination of the Court, within the meaning of the Bankruptcy Act, 1890 (1), s. 8, sub-s. 2, had been stated, the Court was bound to refuse the bankrupt's discharge.

M. J. Muir Mackenzie, for the Board of Trade, in support of the appeal. The order of the county court judge was wrong, and this Court has jurisdiction to vary it by absolutely refusing the order of discharge: *Ex parte Castle Mail Packets Co., In re Payne.* (2) The words of the proviso in s. 8, sub-s. 2, of the Bankruptcy Act, 1890, "the Court shall refuse the dis-

(1) 53 & 54 Vict. c. 71. By s. 8, sub-s. 2, On the application for an order of discharge, the Court may grant, or refuse, or suspend, the discharge, or may make the order conditional: "Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, ... unless for special reasons the Court otherwise determines."

(2) (1886) 18 Q. B. D. 154.

charge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869," are imperative, except so far as they are modified by the subsequent words, "unless for special reasons the Court otherwise determines." According to the true construction of this section, where any of the specified offences have been committed, the Court is bound to refuse the discharge, unless special reasons exist sufficient to justify a different order, and if a different order is made the Court is bound to state the special reasons. In the present case no sufficient special reasons are stated, nor is there any evidence that any exist. [He also referred to *In re Hedley, Ex parte Board of Trade.* (1)]

The Court called on

F. Cooper Willis, for the debtor. The judge has express power by the statute to "otherwise determine," and this distinguishes the present case from *Ex parte Castle Mail Packets Co., In re Payne* (2), which was decided on a section not containing any words giving that power. The sufficiency of the special reasons is a matter to be decided by the county court judge in the exercise of his discretion, which ought not to be overruled on appeal. The special reasons here relied upon are sufficient.

WRIGHT J. This is an appeal by the Board of Trade from the order of the judge of the county court at Birmingham, by which the discharge of the debtor was suspended for a period of two years, and the ground of the appeal is, that the discharge ought to have been refused. The county court judge had before him, on the hearing of the debtor's application for an order of discharge, the report of the official receiver, from which it appeared that the debtor had been convicted, under the Debtors Act, 1869, s. 11, sub-ss. 14 and 15, of the misdemeanours of obtaining credit, on the false pretence of carrying on business, within four months next before the presentation of a bankruptcy petition against him, and of disposing, otherwise than in the ordinary way of his trade, of property obtained on credit, and not paid for, within a like period next before presentation

(1) [1895] 1 Q. B. 923. (2) 18 Q. B. D. 154.

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Wright J.

of the petition, and had been sentenced to six months' imprisonment. Primâ facie in such a case the Court would have no power to grant the bankrupt his discharge, for the words of s. 8, sub-s. 2, of the Bankruptcy Act, 1890, are imperative, "Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869"; this enactment however is qualified by the subsequent words in the same sub-section, "unless for special reasons the Court otherwise determines." Now the Court has from time to time specified various special reasons which come within this proviso. In the present case the order, as drawn up, assigns as a reason the fact that the jury before whom the debtor was convicted strongly recommended him to mercy; but it seems to me that this is not a special reason, within the meaning of the Act, and it appears further that the recommendation to mercy was not the unanimous recommendation of the whole jury. So much for the actual order, as drawn up. We have also a note of the judgment delivered by the county court judge; but I cannot find in that judgment any special reasons stated which I feel able to hold sufficient to satisfy the words of the statute. The county court judge states that the debtor had paid for his sin, that he had suffered imprisonment. These reasons appear to me to be insufficient, and I cannot find any ground in the judgment, as delivered, sufficient to justify the granting of the discharge on the terms on which it has been granted. But, further, there is a note, added by the county court judge to his judgment, in which he expresses an opinion that the offences committed by the bankrupt were the results more of confusion and distress than of deliberate fraudulent intent, and that he was thoroughly penitent and intended to do his best to work in the future, and to pay his creditors if he could. I cannot see that it would be for the benefit of the creditors to grant the discharge, and I cannot see that the note really adds anything to the judgment. Therefore I have come to the conclusion that the learned county court judge has given more weight to the circumstances to which he refers than the Act of Parliament allows, and I am afraid that we are not at liberty to take quite the same view as he has taken, for I think

that in taking that view he went beyond what the Act justifies. I understand that the debtor is prepared to consent to judgment being entered against him, and that the Board of Trade do not raise any objection to the order which we propose to make. Strictly, in the absence of special reasons, the discharge ought to be unconditionally refused, but under the circumstances of the present case I think we are not absolutely bound to take that course. We propose to vary the order, and make it a condition that the debtor shall consent to judgment being entered against him for a sum of 2000*l.*, and, if he does that, he will obtain his discharge after a period of two years' suspension.

KENNEDY J. concurred.

Order varied.

Solicitor for the appellant: *The Solicitor to the Board of Trade.*

Solicitor for the respondent: *Maurice Mosely, for Weekes & Co., Birmingham.*

P. B. H.

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June 30;
July 1, 7.

[IN THE COURT OF APPEAL.]

ATLAS METAL COMPANY *v.* MILLER.

Practice—Costs—Taxation—Counter-claim.

In an action where there is a claim and counter-claim, the party ordered to pay or receive the costs of the action pays or receives the whole of such costs as if there were no counter-claim.

The party ordered to pay or receive the costs of the counter-claim pays or receives the costs occasioned by the counter-claim, and in determining what they are, costs which have been saved by a counter-claim being brought instead of a cross-action are not to be taken into account.

Costs which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counter-claim, must be apportioned by the taxing master, but no costs incurred in the action which have not been increased by reason of the counter-claim are to be apportioned.

Saner v. *Bilton*, (1879) 11 Ch. D. 416, and *Shrapnel* v. *Laing*, (1888) 20 Q. B. D. 334, considered.

Decision of Channell J., affirming the decision of the taxing master, reversed.

In this case the plaintiffs brought an action to recover damages for an alleged libel. The defendants pleaded justification, and by a counter-claim sought to recover damages from the plaintiffs for an alleged libel by the plaintiffs on the defendants. The action was tried with a jury before the Lord Chief Justice, and judgment was entered for the defendants on the claim with costs, and for the plaintiffs on the counter-claim with costs, and it was adjudged "that the defendants recover against the plaintiffs their costs of defence to the claim to be taxed, and that the plaintiffs recover against the defendants their costs of defence to the counter-claim to be taxed."

The defendants' bill against the plaintiffs was delivered at 260*l.* 12*s.* 11*d.*, and the plaintiffs' bill at 206*l.* 16*s.* 8*d.* The taxing master allowed the defendants 168*l.* 13*s.* 9*d.* and the plaintiffs 180*l.* 8*s.* 6*d.*, thus leaving the defendants with a balance of 11*l.* 14*s.* 9*d.* to pay.

The defendants carried in objections, the material part of which was as follows:—

"The master has taxed the costs of both parties as though

there had been two separate and distinct actions, and has allowed attendances on summonses, general attendances, term fees, instructions for brief, fees to counsel thereon, attendances in court, copies of documents, &c., to both parties, the result being that, although the defendants succeed, they are deprived of the general costs of the action. The master considered that he was bound by the decision of *Shrapnel* v. *Laing* (1); but it is respectfully submitted that the case is governed by *Saner* v. *Bilton* (2), and that the defendants are only liable to pay the amount by which the costs have been increased by reason of the said counter-claim, and that they are entitled to the general costs of the cause. The defendants have not set out in detail the items complained of, as, assuming their contention is correct, the bills of costs will practically have to be retaxed, and the defendants object to the general principle on which the costs have been taxed."

The taxing master replied as follows :—

" *Saner* v. *Bilton* (2) does not apply. *Shrapnel* v. *Laing* (1) is a more recent case before the Court of Appeal. The cases are precisely similar. The purpose for which the defendants counter-claimed is immaterial; they have counter-claimed, and the counter-claim is a cross-action. For the details of the taxation the master begs to refer to the bill of costs."

The defendants appealed, and the appeal was heard by Channell J., who upheld the decision of the master. The defendants then appealed to the Court of Appeal.

Bousfield, Q.C., *Bray, Q.C.*, and *Newton Crane*, for the appellants. The costs of a counter-claim mean costs occasioned by the counter-claim being raised, and do not include costs which would have been incurred whether the counter-claim had been raised or not. *Saner* v. *Bilton* (2) is like the present case and governs it. There, as here, the claim and counter-claim had both been dismissed with costs, and it was held that the plaintiff was to pay to the defendant the general costs of the action, and the defendant to pay to the plaintiff only the amount by which the costs had been increased by the counter-

(1) 20 Q. B. D. 334. (2) 11 Ch. D. 416.

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claim. This decision was approved by the Court of Appeal in *Mason* v. *Brentini* (1) both as to the result and the reasons. The taxing master relied on *Shrapnel* v. *Laing*. (2) In that case the claim and the counter-claim both succeeded, and there is no exception to be taken to the mode of dealing with the costs. The decision does not in any way affect that in *Saner* v. *Bilton* (3), as appears from *In re Brown, Ward* v. *Morse*. (4)

Eldridge, for the plaintiff. There is in this case a substantial counter-claim not in the nature of set-off, and the counter-claim is in the nature of a cross-action. There cannot be a different principle of taxation according as the parties both succeed or both fail, as is laid down both by Baggallay L.J. and by Cotton L.J. in *In re Brown, Ward* v. *Morse*. (4) The principle of taxation is laid down in *Baines* v. *Bromley*. (5) Where the plaintiff succeeds in the action and the defendant on the counter-claim, the plaintiff gets the general costs except so far as increased by the counter-claim; the defendant gets the costs of the counter-claim. The master here has acted on that principle. The decision in *Shrapnel* v. *Laing* (2) was approved and followed by the Court of Appeal in *Finska* v. *Brown*. (6)

Bousfield, Q.C., in reply. The master has not followed a correct principle. He has allowed a certain class of items to both plaintiff and defendant as if the claim and counter-claim were independent actions. Thus he has allowed sittings fees to both parties, and has given the maximum fee to the plaintiff for delivering a brief on the counter-claim. The principle which reconciles *Saner* v. *Bilton* (3) and *Shrapnel* v. *Laing* (2) is, Was the plaintiff right in starting the litigation? If he was he will get the bulk of the costs, if he was not he will pay the bulk of them.

Cur. adv. vult.

July 7. The judgment of the Court (Lindley M.R. and Chitty L.J.) was now delivered by

LINDLEY M.R. In this action the plaintiffs sought to recover damages from the defendants for a libel by the defend-

(1) (1880) 15 Ch. D. 287.
(2) 20 Q. B. D. 334.
(3) 11 Ch. D. 416.
(4) (1883) 23 Ch. D. 377.
(5) (1881) 6 Q. B. D. 691.
(6) (1891) 7 Times L. R. 578.

ants on the plaintiffs. The defendants defended the action, and by a counter-claim sought to recover damages for a libel on themselves by the plaintiffs.

The action was tried with a jury, who found a verdict for the defendants on the claim and for the plaintiffs on the counter-claim; and judgment was entered accordingly for the defendants on the claim with costs, and for the plaintiffs on the counter-claim with costs.

The costs have been taxed, and the taxing master, following what he understood to be the rule laid down in *Shrapnel* v. *Laing* (1), has apportioned some of the costs of the action between the plaintiffs and the defendants. The defendants complain of this, and contend that none of the costs of the action ought to be thrown on them. Channell J. at chambers upheld the master's decision, and the defendants have appealed to this Court. The defendants rely on *Saner* v. *Bilton* (2), which was approved and followed by the Court of Appeal in *Mason* v. *Brentini* (3) and *Ward* v. *Morse* (4), and still more recently in the case of *Russell* v. *Russell* (5), which was an appeal from the Divorce Court.

Having carefully studied these cases and compared them with *Shrapnel* v. *Laing* (1), *Hewitt* v. *Blumer* (6), *Finska Angfartygs Aktiebolaget* v. *Brown & Co.* (7), and the earlier case of *Baines* v. *Bromley* (8), we are unable to see any conflict in principle between them if attention is paid to the points really decided by them. There is no decision that a plaintiff who has to pay or to receive the general costs of an action can throw on his opponent or have thrown on himself any part of such costs; on the other hand, there are decisions that no such apportionment can be made. In *Baines* v. *Bromley* (8) and in *Shrapnel* v. *Laing* (1) the late Master of the Rolls expressed his opinion that costs common to both claim and counter-claim should be apportioned, and he suggested that even the costs of the writ might be so dealt with (9), because the defendant got

(1) 20 Q. B. D. 334.
(2) 11 Ch. D. 416.
(3) 15 Ch. D. 287.
(4) 23 Ch. D. 377.
(5) Unreported, Jan. 19, 1898.
(6) (1886) 3 Times L. R. 221.
(7) W. N. (1891) 116.
(8) (1880) 6 Q. B. D. 691.
(9) 20 Q. B. D. 334, at p. 339.

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the benefit of his counter-claim by means of the writ issued by the plaintiff. But Lord Esher was careful to add that it was unnecessary to decide such questions as they did not arise.

We will make another preliminary observation before examining the decisions more closely. We have not to consider in this case how an order should be drawn up so as to give the general costs of an action in which there is a claim and counter-claim to that party who recovers more than is recovered from him. It is unnecessary to consider such cases as *Lowe* v. *Holme* (1) and *Lund* v. *Campbell.* (2) In such cases the judge who tries the action without a jury has greater power over the costs than a judge who tries an action with a jury. In the present case judgment has been pronounced and drawn up, and all we have to do is to construe and give effect to it. Whether an action is brought in one Division of the High Court or another, whether it has been tried with a jury or without a jury, its construction and legal consequences when drawn up must in principle be the same, although the costs to be taxed may be different in the one case from those in the other.

Now let us take the judgment in this particular case. There were some separate orders as to costs, but it is unnecessary to refer to them. By the judgment as drawn up the plaintiffs have to pay the defendants the costs of the action—not some of them or some portion of them, but all of them. There are no separate issues in the action the costs of which have to be borne by the defendants. In considering what are costs of the action the counter-claim, as distinguished from the defence, ought to be disregarded. The costs of the action ought to be taxed as if there were no counter-claim. Whether both parties fail (as in *Saner* v. *Bilton* (3), *Mason* v. *Brentini* (4), and *Russell* v. *Russell* (5)), or whether both succeed (as in *Baines* v. *Bromley* (6), *Ward* v. *Morse* (7), *Shrapnel* v. *Laing* (8), and *Hewitt* v. *Blumer* (9)), or whether one fails and the other succeeds, can in principle make no difference. This was pointed out and

(1) (1883) 10 Q. B. D. 286.
(2) (1885) 14 Q. B. D. 821.
(3) 11 Ch. D. 416.
(4) 15 Ch. D. 287.
(5) Unreported.
(6) 6 Q. B. D. 691.
(7) 23 Ch. D. 377.
(8) 20 Q. B. D. 334.
(9) 3 Times L. R. 221.

decided in *Ward* v. *Morse* (1); and *Baines* v. *Bromley* (2) and *Shrapnel* v. *Laing* (3) in no way conflict with that decision. In *Baines* v. *Bromley* (2) the defendant recovered on his counter-claim more than the plaintiff recovered on his claim; but the order gave the plaintiff the costs of the action, and he was held entitled to them accordingly. No question of apportionment was raised or decided, although Lord Esher in his judgment stated what in his opinion ought to be done as regards costs common to both claim and counter-claim. *Shrapnel* v. *Laing* (3) and *Hewitt* v. *Blumer* (4) were precisely similar cases, and are open to precisely similar observations.

In *Finska Angfartygs Aktiebolaget* v. *Brown & Co.* (5) the plaintiff recovered on his claim more than the defendant recovered on his counter-claim. The plaintiff got the costs of the action, but he had to pay the costs of the counter-claim. He sought to escape from the foregoing rule, and wanted the whole costs of the litigation. But the Court of Appeal decided against him, following *Shrapnel* v. *Laing*. (3)

All the authorities agree so far, i.e., they all decide that a plaintiff who is to pay or be paid the costs of his action is to pay or be paid the whole of such costs as if there were no counter-claim.

Next, as to the counter-claim. The defendant has to pay the costs of this, and the counter-claim is to be treated as an independent cause of action, and, to use Lord Esher's words, as if the claim did not exist. (6) This last expression, however, is calculated to mislead, if not explained and properly understood. What are costs of a counter-claim? The answer must be the costs occasioned by it. No costs not incurred by reason of the counter-claim can be costs of the counter-claim. The fact that if there had been no action the costs of the counter-claim would have been larger, because the defendant would then have had to issue a writ and take other proceedings, does not make costs not incurred costs incurred, and in considering what the costs of a counter-claim really have been in any particular case, the

(1) 23 Ch. D. 377.
(2) 6 Q. B. D. 691.
(3) 20 Q. B. D. 334.
(4) 3 Times L. R. 221.
(5) W. N. (1891) 116.
(6) 20 Q. B. D. 334, at p. 338.

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costs saved by not bringing a cross-action cannot be treated as costs incurred.

The introduction of counter-claims has given litigants advantages in this respect. Counter-claims, although cross-actions for all purposes of procedure and evidence, cost less than actions, and the party who has to pay the costs of a counter-claim gets the benefit of the cheaper procedure. To include in the costs of a counter-claim any costs not occasioned by its being a counter-claim, but saved by its being what it is, appears to us wrong in principle and opposed to *Saner* v. *Bilton* (1) and *Ward* v. *Morse*. (2) If Lord Esher really meant to express a contrary opinion we cannot agree with him. We are satisfied that there is no decision to that effect. But, as pointed out by Lord Esher, there may be costs brought in for taxation which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counter-claim, e.g., where there is a defence of set-off equal to the plaintiff's demand, and a counter-claim for more than the plaintiff's demand. In such cases the taxing master must apportion the costs as best he can, and fix the amount applicable to the defence and the amount applicable to the counter-claim. Where there are no separate issues requiring special treatment the costs of the defence will be costs of the action; the costs attributed to the counter-claim will be costs of the counter-claim. Costs common to both defence and counter-claim must necessarily be dealt with in this way. But to do so is very different from apportioning what are properly costs of the action. Such costs when ascertained must be paid by the party ordered to pay them. They cannot have been increased by the counter-claim, and no part of them can be properly regarded as costs of the counter-claim.

In the present case the master has lost sight of these principles, and has apportioned some costs which are properly costs of the action, and has thrown some part of them on the defendants. In other instances he has tried to bring about a fair apportionment by equalizing the amounts allowed to each party so as to set one off against the other. The result is that

(1) 11 Ch. D. 416. (2) 23 Ch. D. 377.

the defendants receive less than they ought in respect of the costs of the action, and pay more than they ought in respect of the costs of the counter-claim. The case must therefore go back to the master in order that he may review his taxation in accordance with the principles above explained, and which are in accordance with all the previous decisions when carefully examined.

The costs of this application both here and below will be reserved until we know the result of the taxation.

Appeal allowed.

Solicitors: *Indermaur & Brown; Sugden & Harford.*

H. C. J.

[IN THE COURT OF APPEAL.]

THE WEST LONDON SYNDICATE, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Stamp—Conveyance on Sale—Agreement for Sale—Ad valorem Duty—Leasehold Interest in Licensed House—Goodwill—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "any contract or agreement made in England or Ireland under seal, or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages . . . . or goods wares or merchandise . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash, and book debts; of the total consideration 4085*l.* was apportioned to "lease and goodwill," 1462*l.* to furniture, stock-in-trade, and cash, and 37*l.* to book debts. The vendor was to shew a good title to the lease and to assign the lease and goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of

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the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10s. :—

Held, (1.) by A. L. Smith and Vaughan Williams L.JJ., affirming the judgment of the Divisional Court, that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891; by Rigby L.J., that though the agreement was not on the face of it an agreement for the sale of an equitable interest, the proper inference to be drawn from the facts was that the bargain was for the sale of an equitable interest only; (2.) by A. L. Smith and Rigby L.JJ., reversing the decision of the Divisional Court, that the goodwill was not merely an enhancement of the value of the leasehold premises, but was capable of being sold independently thereof, and, as it was property other than lands, the agreement was liable to ad valorem duty in respect of the value of the goodwill; by Vaughan Williams L.J., that the goodwill was inseparable from the leasehold premises which were the subject of the sale, and that the instrument was not liable to ad valorem duty upon that portion of the consideration attributed to "lease and goodwill."

APPEAL from a judgment of a Divisional Court, reported [1898] 1 Q. B. 226, on a case stated by the Commissioners of Inland Revenue.

The instrument presented for the opinion of the commissioners was an agreement under seal dated March 19, 1895, for the sale by Percy Thorne to the appellants of, firstly, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor on premises thereinafter mentioned, and the full benefit of the victualler's and other licences, and of all contracts, engagements, and privileges to which the vendor was entitled in relation thereto; secondly, the lease of a certain hotel and premises and the vendor's right, title, and interest therein, subject to a yearly rent, together with the policy of insurance against fire; thirdly, all the household furniture, fixtures, fittings, and other effects (other than stock-in-trade) in and upon the premises belonging to the vendor, and the benefit of the policy of insurance against fire then subsisting therein; fourthly, the stock-in-trade to which the vendor was on the previous November 17 entitled in relation to the business of an hotel proprietor and licensed victualler carried on by him upon the said premises; fifthly, all cash in hand and at the bank to which the vendor was entitled at the

said date; and, sixthly, all the book and other debts due to him in connection with the business.

By clause 2 it was provided that the consideration for the sale should be the payment, satisfaction, and discharge by the appellants of the debts and liabilities of the vendor due and owing to him at the said date in relation to the business, and the sum of 4250*l.*, of which 1462*l.* 16*s.* 3*d.* was the apportioned consideration for the furniture, stock-in-trade, and cash.

By clause 3 it was provided that the vendor should shew a good title to the leasehold premises, and well and effectually assign to the appellants or their assigns the lease thereof and the goodwill of the business. Clause 6 provided that, in the event of the consent of the landlords to the assignment of the leasehold premises not being obtained, the vendor should, at the option of the appellants, execute a declaration of trust of the leasehold premises in their favour.

The commissioners were informed that the amount of debts and liabilities, forming part of the consideration under clause 2, was the sum of 1335*l.* 8*s.* 4*d.*, and that the purchase consideration was therefore that amount plus 4250*l.*, namely, 5585*l.* 8*s.* 4*d.*, and that this total was arrived at in the following manner:—

	£	*s.*	*d.*
For lease and goodwill	4085	8	4
Household furniture, &c. . . .	1260	0	0
Stock-in-trade	100	0	0
Cash at bank	102	16	3
Book debts	37	3	9
	5585	8	4

and that it was quite impossible to sever the goodwill from the lease itself, because the goodwill was considered to be of no value as it could not exist apart from the lease, but that without a covenant restricting the vendor from carrying on business the lease would be of less value by 400*l.* or 500*l.*

The commissioners called for the production of any assign-

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ment of the leasehold premises which might have been executed, and a declaration of trust dated March 21, 1895, by which the equitable interest in the leasehold premises became vested in the appellants, was produced. No part of the consideration was expressed by the declaration of trust as being apportioned to the leasehold premises, and that deed was not stamped with ad valorem duty on 4085*l.* 8*s.* 4*d.*, but was stamped only with the fixed duty of 10*s.*

The commissioners, having regard to the provisions in ss. 5 and 15 of the Stamp Act, 1891, were of opinion that, inasmuch as neither the sum of 4085*l.* 8*s.* 4*d.* nor any other part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises, so as to make that instrument chargeable according to its terms with ad valorem duty as a conveyance on sale, the whole consideration, except the sum of 1462*l.* 16*s.* 3*d.* apportioned as the consideration for the furniture, stock-in-trade, and cash, was to be regarded as applicable to the other property sold under the agreement. They were, therefore, of opinion that the agreement was chargeable under s. 59, sub-s. 1, of the Stamp Act, 1891, with ad valorem conveyance duty on the sum of 5585*l.* 8*s.* 4*d.*, less the sum of 1462*l.* 16*s.* 3*d.* apportioned as aforesaid, making the net sum of 4122*l.* 12*s.* 1*d.* They accordingly assessed the ad valorem stamp duty of 20*l.* 15*s.* upon the agreement, being the ad valorem duty of 5*s.* for every 50*l.* of the sum of 4122*l.* 12*s.* 1*d.* payable under the head "Conveyance or Transfer on Sale" in the first schedule to the Stamp Act, 1891; and they also assessed the fixed duty of 10*s.* in respect of the agreement for the sale of the leasehold premises, furniture, stock-in-trade, and cash.

The Divisional Court decided that the instrument was not chargeable with the ad valorem duty of 20*l.* 15*s.* assessed thereon by the commissioners, but that ad valorem duty was chargeable on the book debts, and gave judgment for the appellants accordingly. (1)

The commissioners appealed.

(1) [1898] 1 Q. B. 226.

The Attorney-General (*Sir R. E. Webster, Q.C.*) and *Danckwerts*, for the commissioners.

A. T. Lawrence, Q.C. (*W. R. Smith* with him), contra.

Cur. adv. vult.

Aug. 5. A. L. SMITH L.J. read the following judgment:—This is an appeal by the Crown against the judgment of a Divisional Court, which held that the Crown was not entitled to an ad valorem stamp duty under s. 59, sub-s. 1, of the Stamp Act, 1891, upon an instrument presented by the West London Syndicate to the Commissioners of Inland Revenue under the 12th section of that Act. The grounds upon which the Divisional Court so held were that the instrument carried in to be stamped was not a contract or agreement for the sale of any equitable estate or interest in any property whatever, nor was it a contract or agreement for the sale of any estate or interest in any property except lands, so as to come within s. 59 of the Stamp Act, 1891.

It is common ground that that section was passed to saddle with stamp duty at the earliest possible moment contracts and agreements which come within the section, so that the Crown should not have to wait for its duty until a more formal document might be executed, and, if not executed, be deprived of the duty altogether, which was found to be the case under the provisions of the older Stamp Act of 1870 (33 & 34 Vict. c. 97). The commissioners held that the instrument in question was liable to stamp duty within s. 59 of the Act of 1891, and assessed the duty payable thereon, but stated a case for the opinion of the Court. The first question which arises is, whether the instrument is a contract or agreement for the sale of any equitable estate or interest in any property whatsoever. It is a contract bearing date March 19, 1895, by which the vendor (Thorne) agreed to sell, and the West London Syndicate, Limited, agreed to purchase—(1.) the goodwill of Fischer's Hotel, Clifford Street, and full benefit of the licences and of all other contracts, engagements, and privileges to which the vendor was entitled in relation thereto; (2.) the lease of the

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hotel; (3.) the household furniture, fixtures, fittings, and other effects (other than stock-in-trade of the hotel); (4.) the stock-in-trade; (5.) all cash in hand; and (6.) the book debts, for the price of 5585*l.*, which was to be paid as follows—namely, as to 1335*l.*, being debts of the vendor which were to be paid by the purchasers in part payment of the purchase-money, and as to the residue, 4250*l.* in cash, making together 5585*l.* in all. Included in this sum of 4250*l.*, was the sum of 1462*l.* specially allocated to the furniture, stock-in-trade, cash, and book debts agreed to be sold and purchased.

Clause 6 of the agreement is as follows: "The leasehold premises hereby agreed to be sold being only assignable with the consent of the landlords from whom the same are held, the vendor shall use his best endeavours to obtain the requisite consent for the assignment thereof to the syndicate or their assigns, and in the event of such consent not being obtained, the vendor shall at the option of the syndicate execute a declaration of trust of the said leasehold premises in its favour."

Now, taking by itself this instrument of March 19, 1895, which was the instrument taken in to be stamped, and which the commissioners hold is the instrument to be stamped with an ad valorem duty, does the option given by clause 6 to the purchasers (the syndicate) to take a declaration of trust, if so minded, instead of a conveyance of a legal interest, constitute a contract or agreement for the sale of an equitable estate or interest in any property whatsoever.

It will be seen that, apart from this option, the document is a contract to convey a legal and not an equitable interest. The purchasers were under no obligation to take a declaration of trust. They had not contracted that they would do so, and to constitute a contract or agreement within the meaning of the section there must be, as it seems to me, correlative obligations on each side—on the one, to sell, and, on the other, to purchase; and as there is in this case no obligation upon the side of the purchasers to take a declaration of trust, for they might or might not do so just as they pleased, in my judgment the instrument of March 19, 1895, is not a contract or agreement for the sale of any equitable interest whatever within the section.

It was argued for the Crown that at the time the document of March 19, 1895, was taken in to the commissioners, inasmuch as the purchasers had by then taken a declaration of trust, this fact converted the document of March 19, 1895, into a contract or agreement for the sale of an equitable interest; but in my opinion this is not so, for the question, as it appears to me, is what was the document of March 19 when it was signed, that being the document which had to be stamped.

I agree with what my brother Channell has said as to this, and I think this point taken by the Crown cannot be maintained. My brother Rigby draws the inference outside the documents that the intention of the parties was merely to take an equitable interest; but I would rather not found my judgment upon this.

I now come to the second question, which is, whether the goodwill which was agreed to be sold and purchased by the instrument of March 19, 1895, was a "sale of property other than lands."

That goodwill is "property" within the meaning of the Stamp Acts is clear: see the case of *Potter* v. *Inland Revenue Commissioners*. (1) It is also clear that goodwill is not land. Goodwill, therefore, primâ facie comes within the express terms of s. 59 of the Act of 1891 as being "property other than land," and so far the Crown makes out its case.

But it was thus argued for the respondents, the purchasers. They say that Sir George Jessel M.R. in *Ex parte Punnett, In re Kitchen* (2), held that, upon the sale of a public-house, the goodwill passes with the public-house, for the goodwill is the mere habit of the customers resorting to the house.

It is said that goodwill in this case is, therefore, nothing but the enhancement of the value of the premises agreed to be sold, and cannot be, and is not, property apart from such premises.

I do not agree in this, for in my opinion goodwill is as capable of being sold as a separate entity for what it is worth as is the tenant's interest in the lease. It may be that by the terms of a lease each must be sold, if sold at all, to the same person; but that does not prevent them being sold as separate

(1) (1854) 10 Ex. 147. (2) (1880) 16 Ch. D. 226.

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and distinct entities; and if so sold goodwill, in my judgment, is property, and is clearly not land.

Now, in this case, the parties by the instrument of March 19, 1895, have expressly, as it appears to me, sold the goodwill, licences, and contracts relating thereto, separate and apart from the lease, and the other entities contracted to be sold.

If the intention of the parties is the governing factor in the case, have not the parties declared what was their intention upon the face of the instrument by agreeing to sell and to purchase the different matters as separate and distinct entities, and especially the goodwill and full benefit of the licences, and of all contracts, enjoyments, and privileges to which the vendor was entitled in relation thereto, separate and apart from the lease?

It is true that the different entities are agreed to be bought and sold for the lump sum of 5585*l.*, out of which the sum of 1462*l.* was allocated to the furniture, stock-in-trade, cash, and book debts. It would seem, upon looking at the declaration of trust, in which no value was put upon the lease, that the goodwill was the thing of value, and not the lease; but, however this is, I do not see how it can be said that in this case the goodwill was not property contracted and agreed to be separately sold by the vendor to the vendee so far as the vendor's interest extended therein, and, if so, this property clearly is not land. It cannot, in my judgment, be truly said that the goodwill in this case is merely an enhancement of the value of land, and nothing more, and sold as part and parcel of the lease so as to be land.

It is alleged by the learned counsel for the Crown that this goodwill was worth the 4250*l.*, and the lease was worth nothing. They seek to adduce this from what the syndicate have not done—I mean the not putting any value upon the lease in the declaration of trust.

I think that the Crown is right in saying that the goodwill in this case is property other than land, and I see no reason to think that the value assessed by the commissioners thereon is not correct, and, inasmuch as, before this case was even argued in the Divisional Court, a conveyance of the legal interest in

the property sold had been executed, and stamped with the identical ad valorem duty which the counsel for the Crown are now contending should have been affixed to the agreement of March 19, 1897, the point as to the exact value of the goodwill appears to me to be of no practical importance.

In my judgment the Crown succeeds upon this appeal, which must be allowed.

RIGBY L.J. read the following judgment:—This was an appeal of the Commissioners of Inland Revenue against an order of the Queen's Bench Division, dated December 15, 1897, assessing the ad valorem duty payable under s. 59 of the Stamp Act, 1891, on a certain instrument dated March 19, 1895, made between one Percy Thorne of the one part, and the West London Syndicate, Limited, hereinafter called the syndicate, of the other part, at the amount payable on 37*l.* 3*s.* 9*d.*, the value of certain debts hereinafter more particularly mentioned. Under s. 12 of the Act the commissioners were required and bound to express their opinion with reference to this instrument upon the question with what amount of duty it was chargeable. The requisition was not made until nearly two years after the execution of the instrument (that is to say, in January, 1897).

The document of March 19, 1895, is very special, and many of its terms require close consideration. The surrounding circumstances are also very special and unusual.

From the recitals it appears, among other things, that the syndicate had, with the consent and privity of the vendor, been acting as proprietor of the hotel and premises and property dealt with in the instrument from a time not defined in the recital, but shewn by clause 8 of the instrument to have begun with November 17, 1894 (say, a period of four months), and that the business thereof had been carried on by it with moneys advanced by the vendor in anticipation of completion, and by way of payment in advance for certain debentures agreed to be subscribed for—such moneys so advanced as aforesaid amounting to 2000*l.*

The hotel dealt with was No. 11, Clifford Street, Bond Street, and was known as Fischer's Hotel.

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By clause 1 of the instrument, the vendor was to sell and the syndicate to purchase, first, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor, and the full benefit of the victualler's and other licences, and of all contracts, engagements, and privileges to which the vendor was entitled in relation thereto; second, the two leases of the hotel particularly described for terms making together a term of twenty-one years from Christmas, 1894, subject to the yearly rent of 964*l.*

Then, under the heads 3, 4 and 5, followed particulars of furniture, stock-in-trade, and cash (in respect of which no ad valorem duty would be payable), and under the head 6 certain book debts estimated at the value of 37*l.* 3*s.* 9*d.*

By clause 2, the consideration for the sale of the whole of the particulars mentioned was stated to be the satisfaction by the syndicate of debts and liabilities of the vendor (the amount of which was not mentioned on the face of the instrument, but was stated by the solicitor to the syndicate, in answer to an inquiry by the commissioners, to be 1335*l.* 8*s.* 4*d.*), and the sum of 4250*l.*, of which sum 1462*l.* 16*s.* 3*d.* was represented to be the apportioned consideration for the furniture, stock-in-trade, and cash.

No other apportionment of consideration was shewn by the instrument.

Clauses 3 and 4 were appropriate clauses for a sale of the legal interest in the leases.

By clause 5 it was provided that the purchase should be completed on March 23 (four days after the date of the instrument), on which day the purchase-money was to be paid or satisfied.

Clause 6 was as follows: "The leasehold premises hereby agreed to be sold being only assignable with the consent of the landlords from whom the same are held, the vendor shall use his best endeavours to obtain the requisite consent for the assignment thereof to the syndicate or their assigns, and, in the event of such consent not being obtained, the vendor shall at the option of the syndicate execute a declaration of trust of the said leasehold premises in its favour."

Clause 7 gave the syndicate an option of satisfying 3000*l.*,

part of the 4250*l.* cash purchase consideration, by the issue to the vendor of 120 debentures of 25*l.* each, and the balance of 1250*l.* was to be satisfied by the issue to him or his nominees of 1250 shares of 1*l.* each, to be numbered 8 to 1257 inclusive (obviously following on the seven allotted to the subscribers of the memorandum of association).

The debentures were to form part of a total issue of 200 debentures of 25*l.* each, ranking pari passu as a first charge on the syndicate's undertaking.

By clause 8 the syndicate was, from November 17, to be deemed to have had possession of the hotel premises and property, and to have carried on the business, and were accordingly to indemnify the vendor against all expenses and liabilities incurred in the course of so carrying on the same.

By clause 10, the syndicate were to issue the balance of the debentures provided for in clause 7 in discharge of the sum of 2000*l.* advanced by the vendor to the syndicate; and he agreed to accept such debentures in satisfaction and discharge of such 2000*l.*

The material provisions of the instrument being as above set forth, the commissioners were entitled, under sub-s. 2 of the 12th section, to be furnished with such evidence as they might deem necessary in order to shew to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty, and the amount of the duty chargeable thereon, were fully and truly set forth therein.

The commissioners, under the power so given to them, obtained from the solicitor to the syndicate, in answer to inquiries made by them, information to the effect that the whole consideration for the contract consisted of debts and liabilities to the amount of 1335*l.* 8*s.* 4*d.*, making, with the sum of 4250*l.* mentioned in the contract, a total consideration of 5585*l.* 8*s.* 4*d.*, deducting from which 1462*l.* 16*s.* 3*d.*, apportioned in respect of items on which no ad valorem duty was chargeable, and 37*l.* 3*s.* 9*d.*, the value of the book debts, there was left as consideration for the only remaining items, namely, the lease and goodwill, a sum of 4085*l.* 8*s.* 4*d.*, as to which no apportionment was attempted to be made.

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It was indeed alleged on behalf of the syndicate that it was quite impossible to sever the goodwill from the lease itself, because the goodwill was considered to be of no value, as it could not exist apart from the lease, but it was at the same time stated that, without a covenant to restrict the vendor from carrying on business, the lease would be of less value by 400*l.* to 500*l.*

The commissioners called for the production of any assignment of the leasehold premises, and a declaration of trust dated two days after the execution of the instrument of March 19, 1895, was produced, whereby it was declared that Percy Thorne, his executors and administrators, should thenceforth stand seised of and interested in the hotel and premises in trust for the syndicate; and the syndicate covenanted thereafter to pay the rent reserved by the existing indentures of lease, and observe and perform the covenants therein, and indemnify the said Percy Thorne in respect of any breach.

The declaration of trust contained a recital—"And whereas the said leases contain certain covenants which preclude the said Percy Thorne assigning or underletting the premises without the consent in writing of the lessor, and it is not deemed expedient at the present time to apply for such consent."

After the declaration of trust, Percy Thorne had nothing left in him but the bare legal estate in the leasehold property.

The commissioners were of opinion that, inasmuch as no part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises so as to make that instrument chargeable with ad valorem duty as a conveyance on sale, the whole consideration, except the 1462*l.* 16*s.* 3*d.* apportioned by clause 2 of the instrument, was to be regarded as applicable to the other property sold. They therefore expressed the opinion that the instrument was chargeable under s. 59, sub-s. 1, of the Act with ad valorem conveyance duty on the whole consideration of 5585*l.* 8*s.* 4*d.*, less 1462*l.* 16*s.* 3*d.*, or 4122*l.* 12*s.* 1*d.*, and assessed the ad valorem duty on that sum, which, at the rate of 5*s.* for every 50*l.*, amounted to 20*l.* 15*s.* Under s. 13, sub-s. 1, of the Act, any person

dissatisfied with the assessment of the commissioners may within twenty-one days after the date of the assessment and on payment of duty in conformity therewith, appeal against the assessment to the High Court, and may for that purpose require the commissioners to state and sign a case setting forth the question upon which their opinion was required.

The syndicate, in accordance with the terms of this section, in due time paid the duty of 20*l.* 15*s.*, and required the commissioners to state a case.

This was done, and the case stated, in substance, set forth the facts hereinbefore noticed, and made copies of the instrument of March 19 and the declaration of trust of March 21 part of the case. The questions for the opinion of the Court were: (1.) Whether the instrument is chargeable with the ad valorem duty of 20*l.* 15*s.* in accordance with the assessment of the commissioners. (2.) If not, with what amount of ad valorem duty the instrument is chargeable.

Under s. 13, sub-s. 3, of the Act, the duty of the Court is, upon the hearing of the case, to determine the question submitted, and, if the instrument in question is, in the opinion of the Court, chargeable with any duty, to assess the duty with which it is chargeable.

Sub-sects. 4 and 5 of the same section provide for the repayment of any excess of duty, and for costs in the alternative events of the commissioners' assessment being held to be erroneous or confirmed.

By an order dated December 15, 1897, the Divisional Court expressed the opinion that the assessment of the commissioners was erroneous, and that the instrument was chargeable with ad valorem conveyance duty on the amount of the book debts only (amounting, as hereinbefore appears, to 37*l.* 3*s.* 9*d.*), and reversed the decision of the commissioners, and ordered that any excess of duty paid by the appellants should be returned to them by the respondents.

During the argument before the Divisional Court it was stated that at some time after the decision of the commissioners an assignment of the legal estate in the leaseholds had been executed to the syndicate or their nominees, and stamped with

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an ad valorem duty of 20*l.* 15*s.*, the amount assessed by the commissioners on the instrument of March 19, 1895.

Against this decision the commissioners appealed; and this Court has now to determine whether the assessment of the Divisional Court is right, and, if not, has to assess the amount of ad valorem duty payable.

Two main points were argued on the appeal to this Court, and apparently in the Court below—(1.) whether the contract on the face of it was a contract for a sale of an equitable interest in the leaseholds; (2.) whether the goodwill was property in respect of which ad valorem duty should be charged apart from the leaseholds. Both points were decided against the commissioners in the Divisional Court.

As to the first point, I am not disposed to differ from the decision in the Court below so long as attention is confined to the language of the instrument itself. The only clause relied upon as shewing that the contract was for a sale of an equitable interest was clause 6, and that clause does not throw an obligation upon the syndicate to accept a declaration of trust in lieu of a legal assignment, but only gives them an option. On the face of it, therefore, the only contract is for a sale of a legal interest.

But regard must be had not only to what the parties have said, but to what they actually meant. It is incumbent on the syndicate to shew that all the facts and circumstances affecting the liability of the instrument to duty, and the amount of duty chargeable thereon, are fully and truly set forth therein, and if, from the facts made known to the commissioners, the proper inference is that the real bargain made was a bargain for a sale of the equitable interest only, then the instrument ought to be charged with the amount assessed by the commissioners.

Now, in my judgment, the facts do lead to that inference. Bearing in mind that the syndicate had the opportunity of explaining any circumstances which might affect the liability to duty, let us see what the facts are which alone were before the commissioners. For four months the hotel had been in the possession of the syndicate, and the business had been carried on by them by means of money to the amount of 2000*l.*

supplied by the vendor. This sum could not be recovered as a debt, but only satisfied by an issue of debentures to the same amount by the syndicate. Unless the syndicate purchased the hotel, such debentures as were required by the contract could not be issued, for they were to be part of a first charge on the undertaking, which, independently of the hotel, had no property. Apparently, no shares had been issued except seven, the minimum number required to be subscribed by the subscribers to the memorandum of association. During the four months it is clear that the lessor had not been approached with reference to giving an assent to an assignment, and yet four days only were allowed for obtaining that assent, and enabling the syndicate to exercise the option purported to be given by clause 6.

It is a plain inference from the facts appearing that the syndicate had no money wherewith to pay in cash the consideration of 3000*l.*, which they had an option of paying in cash. During the same four days, therefore, the debentures for 5000*l.* and the shares for 1250*l.* would have to be issued, and it would have been a very unbusinesslike arrangement to go to the expense of preparing those debentures whilst there could be any reasonable doubt as to the contract going through.

From these circumstances alone an inference might arise that there was no real intention on either side to follow out the requirements of clause 6, though I do not, on the question of construction, feel that such an inference could be acted upon.

But the matter by no means ends there. Within two days after March 19 the contract had been completed on the basis of the syndicate accepting an equitable title.

The recital in the declaration of trust shews that it was not then considered expedient to apply for the consent of the lessor. When was this conclusion arrived at? If it arose from any change of circumstances or change of intention, happening after the execution of the instrument of March 19, it would have been easy for the syndicate to shew such change; but nothing of the kind was suggested. It is not difficult to see why a limited company without capital should hesitate to ask a lessor to accept them as tenants; but this state of things had

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not arisen suddenly, and was not likely to be altered in a couple of days. I have said that the contract was completed by March 21. According to any reasonable or business method of procedure this must have been so, for a vendor who had not been paid or satisfied his purchase-money would never have executed the unqualified declaration of trust actually executed on March 21, the clear effect of which is to represent him as a bare trustee only of the legal estate. Some notice surely would have been taken of the obligation to pay or satisfy purchase-money, if any such obligation existed.

The obligation to satisfy the advances, amounting to 2000*l.*, which could be satisfied in no other way than by issuing debentures, would certainly, I should infer, have been mentioned, if it had not been already satisfied.

The fair inference, again, is that all the debentures had already been issued before execution of the declaration of trust. To be issued they must have been prepared, and it seems to me to be unreasonable to suppose that all this could have been done in a period of two days. The inevitable inference appears to me to be that it was agreed, before or simultaneously with the execution of the 19th of March instrument, that an equitable interest should be taken in place of a legal assignment of the leases, and that the declaration of trust of the 21st must be taken as part of one transaction with the contract of March 19.

If in any way the inferences arising from the facts before the commissioners are inconsistent with the true facts, that is the fault of the syndicate for leaving matters to be dealt with on a partial statement.

If the above conclusion is correct, it is unnecessary to go into the question as to the goodwill; but, in my judgment, the commissioners were right in their view with regard to this. This question is one of considerable importance as to the meaning and operation of the 59th section. The policy of that section is to charge immediately with duty an agreement for the sale of any property except land. If this can be evaded by joining in one agreement for sale at a lump sum, property not land with land, and throwing upon the commissioners the difficulty —which may be well-nigh insoluble by them—of determining

what should be apportioned to each sort of property, a serious blow will be struck at the operation of the section.

As to the particular case before us, where the goodwill of the business and the lease of the premises on which it is carried on are the two items which are sold at a lump sum, it will be convenient to deal first with the question whether any part of the lump sum is to be attributable to the goodwill, and, in the second place with the amount, if any, to be so attributed. Goodwill is certainly property within the meaning of s. 59, and any interest in goodwill must equally be property. It is to me exceedingly difficult to see how in any case goodwill can be land, tenements, or hereditaments within the meaning of the exception. Even if inseparably connected with land, supposing such a case possible, it is not like fixtures attached to the soil so as to be part of the land. But some part, at any rate, must be severable. (See definition of goodwill given by Wood V.-C. in *Churton* v. *Douglas* (1), approved apparently by Lord Herschell in *Trego* v. *Hunt*. (2))

In this particular case a great part of the value of the goodwill might, and probably did, arise from the name—some part certainly did. A West End hotel does not depend for its customers upon chance passers-by, but to a great extent upon visitors to London who engage rooms beforehand. Many of these choose their hotel on the recommendation of friends who have stayed in the hotel, and it would be by the name "Fischer's Hotel" that it would be recommended. Such a goodwill cannot be said to be in law inseparable from the house where the business is for the time being carried on, whatever the practical difficulty of separation in a given case. A great part of it would last on if the business were transferred to the next door. It would be as unlikely that customers would attach importance to the question whether the hotel were at 11 or 12, Clifford Street, as in the case of *Churton* v. *Douglas* (1) it would have been to say that the customers would have had a preference for Fleet Street over the Strand as the place where a wholesale business was carried on. (See observations by Wood V.-C. in that case, and Lord Herschell's comment thereon in *Trego* v.

(1) (1859) Joh. 174. (2) [1896] A. C. 7.

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Hunt. (1)) It is not sufficient to say that in the particular case the business could not be removed without the consent of the lessor. His consent might be purchased, and the transfer of the goodwill of the existing business during twenty-one years might be an important step towards a removal of the business. But there is in any transfer of goodwill a personal element involved, and, for anything that is shewn to the contrary, the personal connection of the vendor in this case may have been of very great, and must be assumed to have been of some, value.

If the lease alone had been dealt with the vendor might, after the sale, have solicited the customers who had been in the habit of staying at the hotel to transfer to him their custom at another hotel. The goodwill having been agreed to be transferred, the vendor could not do this: *Trego* v. *Hunt.* (2)

This seems to me conclusive on the question whether there is not some independent value to be attributed to the goodwill. Additional rights bargained for must be supposed to be worth bargaining for. The part of the goodwill now being dealt with is not only separable from, but has no connection with, the lease of the hotel. It depends upon an implied contract, and cannot, as I think, in any conceivable way be treated as land within the meaning of the exception. It is of the same nature as the supposed covenant not to carry on business elsewhere, mentioned in the case, the absence of which, by the admission of the syndicate's solicitor, would reduce the value of the lease itself by 400*l.* to 500*l.*

It seems to me, therefore, that it is impossible to say that the agreement to transfer the goodwill does not include something over and beyond the lease itself. What the value of that something may be is a very different and very difficult question; but the difficulty is created by the parties to the instrument who have not chosen to apportion in the instrument itself the total consideration.

I do not think that the commissioners could properly have come to a different conclusion from that which they actually arrived at. The only suggestion made by the syndicate is that

(1) [1896] A. C. 7, at p. 17. (2) [1896] A. C. 7.

nothing is to be apportioned to goodwill. It is upon this that they take their stand. That contention, for reasons above appearing, I think untenable.

Assuming that contention to be ruled out, they in fact leave the commissioners to find out for themselves the proper amount to be apportioned.

I think that the commissioners had no information furnished to them which would enable them to apportion the consideration between lease and goodwill according to their values. I think that they were entitled to say to the syndicate, "It is for you to shew what part of the whole consideration is to be thrown upon the lease."

But are there not primâ facie grounds for the conclusion, even if no presumption arises? I think there are.

The goodwill of the business is not only dealt with separately from the lease. It is put in the forefront—that is to say, before the lease—in the order of enumeration of the particulars. This point as to the order might be a small matter if there were not other circumstances tending to enhance the importance of the goodwill. But such considerations are not wanting.

The business had really been carried on for the syndicate during four months, and a sum of 2000*l.* invested in it through the vendor. Where the goodwill and business and the lease for twenty-one years of a hotel in the West End of London, carried on at a house rented at 964*l.* a year, are only treated as worth together a little over 4000*l.*, it is not an unfair inference that the lease of the house without the goodwill and business would hardly be worth the rent. But what seems to me an important consideration is that the parties themselves by the declaration of trust have so treated and dealt with the leases as to affirm in substance that no ad valorem duty was to be paid, and therefore no part of the consideration specifically appropriated to them. If my inferences of fact set forth in the discussion as to the first point are well founded, the declaration of trust was an actually contemporaneous document, in the sense of being part of one and the same transaction; but, apart from that, I think that the commissioners had a right to infer from it, and from the fact that for nearly two years no other

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conveyance had been executed, that the intention of the parties, or at least the effect of what they did, was that the whole ad valorem duty should be, as it were, concentrated upon the goodwill and book debts, and no part attributable to the leases. In this way the parties have solved the difficulty which they have themselves raised.

Some point has been made of the alleged stamping after the assessment by the commissioners of an assignment of the leases with the full ad valorem duty. This was an entirely voluntary act of the syndicate, and can have no effect upon the question whether the commissioners were right or wrong upon the facts as they existed when they made their assessment.

The Court below has held them wrong, and given costs against them on that ground. It is now our duty to review that decision, and to determine whether their assessment was not right.

In my judgment we ought to say that the commissioners were right, that the opinion of the Court below ought to be reversed, and the assessment of the commissioners supported.

I wish to add a word as to a point on which there may be some doubt. Any apportionment to affect the question of duty under s. 59 must be a bonâ fide apportionment, and not a merely formal one; otherwise the section would be reduced, in any case where different properties are included in one agreement, to a nullity.

VAUGHAN WILLIAMS L.J. read the following judgment:— I agree with the decision of the Divisional Court, and adopt the reasoning of Channell J.

With regard to the question whether the instrument in question was a contract or agreement for the sale of any equitable estate or interest in any property whatever, I am of opinion that it was not. I think that it was plainly only a contract for the sale of a legal interest, and that the option given to the purchasers, which they were not bound to exercise, to call for a declaration of trust in the event of the landlord's consent to a legal assignment not being obtained, does not convert the instrument into a contract for the sale of an equitable estate or

interest. The purchasers, in the event of the vendor's failing to obtain the landlord's assent, could have treated the contract to purchase as at an end.

As I understand, both my brethren take this view, if only the words of the instrument are looked at; but Rigby L.J. is of opinion that, if the facts made known to the commissioners are looked at, the proper inference is that the real bargain made was a bargain for the sale of the equitable interest only; and A. L. Smith L.J., although he does not base his judgment on this inference, is not prepared to say that the inference may not properly be drawn. I think that we have no right to draw any such inference. I do not understand Rigby L.J. to infer that the instrument was drawn in the shape in which it was drawn for the purpose of concealing the true nature of the transaction, and thus evading the duty, nor do I see any facts communicated to the commissioners justifying such an inference. I rather understood Rigby L.J. merely to infer as a fact that, notwithstanding the form and words of the instrument, the parties to the instrument must be taken to have meant a bargain different from that which they have expressed; and he draws this inference from the conduct of the parties antecedent and subsequent to the execution of the instrument, and from the relative dates of the execution of the instrument and the declaration of trust, and of the various acts done or omitted by the parties.

Is this inference as to the true meaning of the parties such that it would follow that the vendor could have compelled the purchasers to accept a declaration of trust as a performance of the contract contained in the instrument? It seems to me impossible to draw such an inference as between the parties; and, if such an inference cannot be drawn as between the parties, I do not see what right the commissioners could have to treat the instrument otherwise than in accordance with its meaning inter partes.

The fact that the purchasers had embarked a large sum of money in the business, which they might probably lose if they did not exercise the option to take a declaration of trust, and the fact that they did take the declaration of trust within four

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days of the execution of the instrument, may lead to the inference that it was extremely improbable that the purchasers would refrain from taking the declaration of trust in case the landlord's consent to the assignment of the lease could not be obtained immediately; but I cannot see how these facts can justify the inference that the purchasers meant by the bargain to bind themselves to take a declaration of trust as performance of the contract in case the vendor, being unable to get the landlord's consent, should call on them so to do.

As to the second question which arises in this case, namely, whether the instrument was a contract or agreement for the sale of any estate or interest in any property except lands, tenements, or heritages, this depends on whether the goodwill, which was by a separate clause included in that which was agreed to be sold and purchased by this instrument, was sold and purchased as land—that is, as something enhancing the value of the land and inseparable from it—or whether it was sold and purchased as property other than land. There can be no doubt that goodwill may be so inseparably connected with land—e.g., with a particular house—as to pass under a conveyance of land, or be the subject of an agreement for the sale of land.

Lindley L.J., in his book on Partnership, 6th ed. p. 441, says: "It (goodwill) may have no value except in connection with a particular house, and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned." It seems to me that the goodwill which was the subject of this contract was of that nature; for the goodwill in question was the goodwill of an hotel, and the hotel was leased to the vendor, and the lease was included in the sale, and by the terms of the lease the business could not be removed from the house demised without the consent of the landlord. At the time of the sale, therefore, the vendor could not so sell the goodwill as to be enjoyed apart from the hotel the subject of the lease. The goodwill was made inseparable by the very terms of the lease, the subject of the sale. This goodwill did not belong to the vendor, so that he could sell it apart from the lease. It was part of the reversion of the landlord: *Edwards*

v. *Edwards*. (1) This is the fact in the present case; and, moreover, the goodwill of a leasehold public-house has generally been treated as part and parcel of the demised premises. Thus, in *Ex parte Punnett, In re Kitchen* (2), Jessel M.R., speaking of leasehold premises comprising the Pelican Hotel, Southwark, says: "It is quite plain that the goodwill of a public-house passes with the public-house"; and in *Potter* v. *Inland Revenue Commissioners* (3), in which case the Court held that the assignment by deed by a retiring partner in a paper-making business of his share in the goodwill for the sum of 13,778*l.* was an assignment of property liable to ad valorem duty under 13 & 14 Vict. c. 97, Pollock C.B. in delivering judgment says (4): "The trade, or goodwill of a trade, sometimes enhances the value of real property, as a well accustomed tavern or shop will, on account of the habit of persons to frequent it, sell for much more, and the duty on a conveyance of the place where the business is carried on ought pro tanto to be augmented; and very frequently the goodwill of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it: it is merely the advantage of the recommendation of the vendor to his connexions, and his agreeing to abstain from all competition with the vendee."

This case shews that, although a goodwill may for the purpose of conveyance be separated from realty—e.g., where an outgoing partner sells his interest or share in the goodwill to the continuing partners, who continue owners of the house to which the goodwill is attached—and if it is so separated it would be liable under 13 & 14 Vict. c. 97 to duty as property, yet if it is not so separated it will be treated, on a sale of the premises where the business is carried on, as something enhancing the value of the realty, and pro tanto augmenting the duty on a conveyance of the place where the business is carried on.

Lindley L.J. in *Inland Revenue Commissioners* v. *Angus* (5) says: "Upon a conveyance of a goodwill of a business the

(1) (1837) 1 Jur. 654.
(2) 16 Ch. D. 226.
(3) 10 Ex. 147.
(4) 10 Ex. at p. 157.
(5) (1889) 23 Q. B. D. 579.

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instrument should be stamped with an ad valorem stamp," i.e., as a conveyance of property under 13 & 14 Vict. I understand *Potter* v. *Inland Revenue Commissioners* (1) to mean that where real estate and the goodwill connected with it are conveyed by separate deeds they are both liable to ad valorem duty; and Cotton L.J. in *Cooper* v. *Metropolitan Board of Works* (2), says: "But really 'goodwill' is a word of which few people understand the meaning. It is obvious that there are certain kinds of goodwill to which a mortgagee will be entitled. The goodwill which attaches to a particular house increases the value of that house, and therefore the mortgagee is entitled to that. If, for instance, there is a well-known public-house, and from its position being well known, people frequent it, the goodwill attaches to the house and adds to its value. But there may be other kinds of goodwill attaching to personal reputation which a man has made for himself. Of course that does not go to the mortgagee of the house, but is a thing personal to the man whose skill and whose name have acquired that goodwill." These authorities seem to me to shew that while a goodwill may be conveyed, or subject to an agreement for sale, as land, a goodwill may be sold separately from the land; and no doubt the goodwill in many cases can be and is separately sold, and no doubt in such a case the sale would be treated under s. 59 of 54 & 55 Vict. c. 39, as a contract for the sale of an interest in property except lands; but I do not think one ought so to treat a contract for the sale of a goodwill of a business, carried on in a leasehold hotel, under a lease which makes the business inseparable from the demised premises, where the sale includes an assignment of the lease, unless one can find in the contract a clear intention to separate the goodwill from the leasehold premises, and to treat it otherwise than as something attached to the leasehold hotel enhancing its value. I do not say that it is impossible to infer such an intention in the case of a goodwill of such a leasehold with a covenant not to carry on the business elsewhere; but I do say that in such a case one ought not to draw such an inference without very strong words, and something much stronger than merely cataloguing the items of sale; and especially is this so in a case

(1) 10 Ex. 147. (2) (1883) 25 Ch. D. 472, at p. 479.

where there is only one single agreement and one undivided consideration for the purchase of hotel and goodwill, and a separate consideration for the chattels.

At all events, one must construe the contract of sale, and ascertain, having regard to the words and the subject-matter of the sale, what the intention of the instrument is, and whether or not the parties thereto must be taken to have intended a separate sale of the goodwill.

Now, looking at this instrument, was it the intention to agree to sell the goodwill as something separate from the hotel? It is argued on behalf of the Crown that the agreement is to sell, "firstly, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor upon the premises thereinafter mentioned, and the full benefit of the victualler's and other licences, and of all contracts, engagements, and privileges to which the vendor is entitled in relation thereto"; and it is said that this is a separate agreement for the sale of the goodwill just as much as if it had been a sale by a separate instrument.

But, on the other side, it is urged that there is in fact only one instrument, and that that instrument includes the sale of the lease of the premises on which the business is carried on, the goodwill of which is sold, and that by the terms of the lease the business cannot be carried on elsewhere than on the demised premises, and that, inasmuch as the goodwill cannot be enjoyed separately from the demised premises, and the goodwill of an hotel is in its nature a mere enhancement of the value of the demised realty, it could not have been the intention of the parties to the instrument to sell and buy the goodwill separately from the hotel, and that one must not for the purpose of the revenue laws construe the instrument in a manner manifestly inconsistent with the intention of the parties.

It seems to me that there is great force in this argument.

Suppose a lease of a factory, and a covenant that at the termination of the tenancy the tenant shall give up the premises and all fixed machinery, whether affixed to the freehold by landlord or tenant, and a sale by the tenant which specified (*a*) the fixed machinery, (*b*) the lease. Could it be said that,

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because of the form of sale, the machinery affixed to the freehold ceased to be land or part of the freehold?

Suppose the purchaser had died after making a will, leaving his leaseholds to A. B., and the residue of his property to C. D., could it have been held that the goodwill of this property passed to the residuary legatee? Can one find in this instrument any indication that the parties intended to sever the goodwill from the hotel? If not, for what possible purpose can it be said that the parties intended a separate sale of the goodwill?

The purchaser who, it is said, must be taken to have agreed to purchase the goodwill separately from the hotel, could not deal with or enjoy the goodwill separately from the hotel.

The vendor who, it is said, must be taken to have sold the goodwill separately from the hotel, had no power to sever the business from the hotel.

It is further to be observed that one finds in the contract of sale no separate prices of the hotel and the goodwill of the business carried on in the demised premises, and the goodwill sold is in terms the goodwill of the business carried on by the vendor on the demised premises.

The same thing is true of the licences, for a mortgage of a leasehold public-house, with the goodwill of the business there carried on, gives the mortgagee a right to a transfer of the licences: *Rutter* v. *Daniel.* (1)

Many cases have arisen with reference to the question whether a sale of fixtures comprised in an instrument including the sale of a house, or the lease of a house, is to be treated as a separate assurance of the fixtures, and the test applied has always been—did the instrument shew an intention to sever the fixtures? An intention, that is, that the mortgagee should have the power of selling or otherwise dealing with the fixtures separately from the house: *Ex parte Barclay, In re Joyce* (2); *Ex parte Daglish, In re Wilde* (3); *Batcheldor* v. *Yates* (4); *Brooke* v. *Brooke* (5); *Small* v. *National Provincial Bank of England.* (6)

(1) (1882) 30 W. R. 724, 801.
(2) (1874) L. R. 9 Ch. 576.
(3) (1873) L. R. 8 Ch. 1072.
(4) (1888) 38 Ch. D. 112.
(5) [1894] 2 Ch. 600.
(6) [1894] 1 Ch. 686.

The present case is not a mortgage but a sale, which of course is very different from a mortgage; but the ultimate question to be answered in each case is the same: Does the instrument shew an intention that there should be a separate assurance? The answer in each case is "Yes" or "No," according as the conclusion in each case is that the parties to the instrument did or did not intend that the goodwill or the share of the goodwill should in fact be dealt with separately.

In *Potter* v. *Inland Revenue Commissioners* (1) this test is not applied, because the fact that the outgoing partner was assigning to the continuing partners, the owners of the house to which the goodwill attached, made it unnecessary to find other evidence of the intention to separately convey the goodwill; but in the present case I can find no fact from which one can infer an intention to deal with the goodwill separately from the hotel, and no reason why the parties should wish to deal with the goodwill separately from the hotel, and every reason why they should wish not to do so.

Finally, I do not see how one can adopt the view of the Crown, either on the first question or on the second, without imputing to the parties intentions quite inconsistent with the whole tenor of the instrument, and the intention of the parties to be drawn from the instrument itself, and the subject-matter of the agreement.

I wish to add that, looking at the words at the end of clause 6 of the case, "that without a covenant restricting the vendor from carrying on business the lease would be of less value by 400*l.* or 500*l.*," I thought that, if this meant that there was such a restricting covenant of this sort between the vendor and purchaser, this would shew that there was a right of property distinct from the leasehold interest assigned, and the contention of the Crown, apart from the question of value to be assessed, would be established; but on examination I can find no such covenant, and as to any right to restrain a purchaser carrying on the business of the lease off the demised premises, which would be implied from the acceptance of the assignment of the lease, this implied covenant could be enforced by the

(1) 10 Ex. 147.

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landlord as owner of the reversion, i.e., be enforced by the landlord, by virtue of the covenants in the original lease, against any assignee of that lease.

Appeal allowed.

Solicitor for appellants: *A. E. Griffiths.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

A. M.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* EARL GREY.

Revenue—Estate Duty—Settlement—Reservation of Interest to Settlor—Extent of Liability to Duty on Death of Settlor—Conditional Power of Revocation of Settlement—Exclusion of Benefit to Donor — Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*), (*c*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

By a deed, made in 1885, the owner of certain estates gave them to the defendant in fee, subject to the reservation of an annual rent-charge payable to the donor and expressed to be issuing out of the estates so given. The donor also assigned (with certain exceptions) his personal estate to the defendant, subject to certain trusts and provisions, and subject as to part thereof to a beneficial interest in the donor for his life. The defendant covenanted to pay the debts of the donor, and the deed contained a conditional power of revocation.

After the commencement of Part I. of the Finance Act, 1894, and before the happening of any of the events upon which the power of revocation was exercisable, the donor died:—

Held, affirming the judgment of a Divisional Court, that all the property existing at the death of the donor was liable to estate duty.

By A. L. Smith and Rigby L.JJ., on the ground that it was property which must be deemed to have passed on the death of the donor within s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

By Vaughan Williams L.J.: That it was property of which the donee did not assume possession and enjoyment to the entire exclusion of any benefit to the donor within the meaning of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889.

APPEAL from the judgment of a Divisional Court on an information by the Attorney-General claiming estate duty under the Finance Act, 1894, reported [1898] 1 Q. B. 318.

By a deed dated October 19, 1885, and made between Henry, third Earl Grey (since deceased), of the one part, and the defendant, then Albert H. G. Grey, of the other part, reciting that the said Henry, Earl Grey, was possessed of considerable estates, a portion of which was subject to certain life annuities, and another portion of which was subject to a mortgage, and that he was also possessed of considerable personal estate, including the furniture and effects in the said Earl's mansion-house at Howick, and that the defendant was the nephew of the said Earl Grey and heir-presumptive to the peerage, and that the said Earl Grey was desirous of giving his real and personal estate to the defendant, subject to the provisions thereinafter contained. It was witnessed that the said Earl Grey did convey to the defendant (subject to the said life annuities and mortgage) all his real estate other than the mansion-house and the appurtenances, to the use that the said Earl Grey should thenceforth during his life receive an annual rent-charge of 4000*l.* to be issuing out of the said hereditaments, and subject thereto to the use of the defendant in fee simple. And it was also witnessed that the said Earl Grey assigned to the defendant all the furniture and effects in and about the said mansion-house and all other his personal estate (except his private papers and effects in his own personal use), to hold the same, subject to the trusts and provisions thereinafter contained, to the defendant absolutely for his own use and benefit. And it was declared that the mansion-house, with the gardens, outbuildings, and appurtenances, together with the furniture, plate, articles of household use, carriages and horses, and other things in and about the mansion-house, should be held in trust to permit the said Earl Grey to occupy and use the same respectively during his life. And the defendant covenanted with the said Earl that he, the defendant, his heirs, executors, administrators, or assigns would—(1.) pay the said life annuities; (2.) pay the said mortgage debt with the interest thereon; (3.) pay to the said Earl Grey the said annual rent-charge of 4000*l.*; (4.) at their own cost keep the mansion-house insured and repaired and stock and manage the gardens; (5.) supply to the said Earl Grey (free of cost to him) all such farm and

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garden produce as he might require for consumption at the mansion-house; (6.) pay the funeral and testamentary expenses of the said Earl, and also all his debts to the full exhaustion of all his real and personal property; (7.) that the lands at or near Howick, then farmed by the said Earl, should not be sold or let during his life, but should be farmed personally by the defendant, and that no buildings should be erected thereon without the said Earl's consent; (8.) that they would at the request of the said Earl, his executors or administrators, produce all receipts and vouchers for payments to be made under heads 1, 2, 4, and 6. And it was provided that in the event of the defendant dying in the lifetime of the said Earl, or of any breach by the defendant, his heirs, executors, or administrators of any covenant therein contained, it should be lawful for the said Earl to revoke the deed now in statement either wholly or in part.

By an indenture dated September 26, 1894, and made between Henry, third Earl Grey, of the one part, and the defendant of the other part, it was witnessed that, in consideration of the sum of 5000*l.* paid to the said Earl by the defendant, the said Earl as beneficial owner conveyed and released to the defendant the rent-charge of 4000*l.* to the intent that the lands charged therewith might be discharged from the same, and released to the defendant all the premises conveyed by the indenture of October 19, 1885, from the power of revocation contained therein, and also released the defendant from the covenant to pay the rent-charge, and from the covenant to retain unsold and to farm certain lands near Howick.

The third Earl Grey died on October 9, 1894, and thereupon the defendant succeeded to the earldom. The average net income of the property comprised in the deed of October 19, 1885, after deducting interest on incumbrances and other charges and the cost of management, is, and was before as well as after the date of the last-mentioned indenture, considerably in excess of 4000*l.*

Under the circumstances the Crown claimed that estate duty under the Finance Act, 1894, became due on the principal value (less the value of the incumbrances subsisting thereon) of

the whole of the property comprised in the deed of October 19, 1885, as being property passing on the death of the third Earl Grey, within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, which incorporates the provisions of s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889. (1)

The Divisional Court (Grantham and Channell JJ.) gave judgment in favour of the Crown. (2)

The defendant appealed.

July 29. *Cozens-Hardy, Q.C.*, and *Bremner*, for the defendant. The liability to pay estate duty on the mansion-house is not

(1) By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after June 1, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased."

"(*c*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, "Sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:

"The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

By the Finance Act, 1894, s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include. . . . .

"(*c*) Property which would be required . . . . to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

(2) [1898] 1 Q. B. 318.

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disputed, but the rest of the property does not come within s. 2, sub-s. 1, of the Finance Act, 1894. It certainly did not pass in fact on the death of the third Earl, and could only be made liable under the expression "deemed to include." What was given was the estate subject to payment of 4000*l.* a year to the third Earl, and the estate was thenceforward retained by the defendant "to the entire exclusion of the donor," within s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889. Certainly after the execution of the second deed, if not before, estate duty would have been payable on the whole had the defendant died before the third Earl. The power of revocation was a conditional one, and the contingencies on which it could be exercised did not happen. The right referred to in s. 38, sub-s. 2 (*c*), of the Act of 1881, as reserved by the settlor to restore the property to himself, is an absolute right to retake the property, and such a right did not exist in this case.

[They cited *Attorney-General* v. *Worrall.* (1)]

Sir R. E. Webster, A.-G. (*Vaughan Hawkins* with him), for the Crown. The case falls within clause (*a*) of the Act of 1881, as amended by the subsequent Acts, and it also falls within clause (*c*) of the same sub-section. To prevent the Finance Act, 1894, from applying, the possession and enjoyment of the property must be assumed absolutely and immediately on the gift, and the reservations in the deed of October 19, 1885, shew that not to have been the case here.

Bremner, in reply.

Cur. adv. vult.

Aug. 10. A. L. SMITH L.J. read the following judgment:—In my opinion the Crown succeeds in this case, and the appeal by the present Earl Grey fails.

By the Finance Act, 1894, not only is property which passes upon death, but also property which shall be deemed within the meaning of the Act to pass upon death, is made liable to estate duty; and the question is whether the property upon which the Crown claims duty in the case is property which is deemed to pass within the meaning of the Act upon

(1) [1895] 1 Q. B. 99.

the death of the late Earl Grey, which took place upon October 9, 1894.

By deed bearing date October 19, 1885, the late Earl, in consideration of the natural love and affection which he bore to his nephew, the present Earl, conveyed to the present Earl (the defendant in this information) all his manors, messuages, farms, lands, rent-charges, and other hereditaments, and all leaseholds belonging to the late Earl in fee simple, to the use that the late Earl should during his life receive an annual rent-charge of 4000*l.* a year issuing out of the hereditaments thereby conveyed; and should be also entitled during his life to occupy and enjoy that part of the hereditaments which consisted of the mansion-house at Howick and its appurtenances, together with the furniture, plate, books, pictures, and articles of household use or ornament, wines, stores, garden implements, horses, carriages, and other things whatsoever in or about the said mansion-house and premises. By the deed the present Earl covenanted with the late Earl to pay certain annuities and mortgage and bond debts, and to indemnify the late Earl and his estate from all loss and damage in respect thereof, and to pay the late Earl the annual rent-charge of 4000*l.* per annum, and at the death of the late Earl to pay his funeral and testamentary expenses, including all stamp and other duties, and also the debts of the late Earl, to the full exhaustion of all property real and personal of the late Earl. By this deed it was provided that in the event of the present Earl dying in the lifetime of the late Earl, or of any breach by the present Earl of any of the covenants on his part therein contained, it should be lawful for the late Earl to revoke the said deed either wholly or in part: but, save as aforesaid, the said deed was to be irrevocable, and it was stipulated that any revocation under the powers was to be without prejudice to the title of any purchaser or mortgagee from the present Earl under sale or mortgage made previously to such revocation. The above is a sufficient statement of the deed to raise the point which I have in hand: it will be found set out at length in the information in this case. By an indenture made on September 26, 1894, between the late and present Earl, the late Earl, two weeks

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before his death, which occurred, as I have said, upon October 9, 1894, in consideration of 5000*l.* paid him by the present Earl, released unto the present Earl the rent-charge of 4000*l.* a year, as also the power of revocation contained in the indenture of October 19, 1885; and, as I understand, the late Earl remained in possession of the mansion-house and its amenities, as by the deed of October 19, 1885, is provided, until his death.

The question is whether the property contained in the indenture of October 19, 1885, was property which is deemed to pass upon the death of the late Earl within the meaning of the Finance Act, 1894, so as to be liable to estate duty. That brings me to s. 2, sub-s. 1 (*c*), of the Act of 1894. By it property passing on the death of the deceased shall be deemed to include "property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." In *Attorney-General* v. *Beech* (1) I commented upon this class of legislation, and I have nothing further to say thereon.

Now what is it that the 38th section of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, as amended by the Finance Act, 1894, has enacted? Sect. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, must for the present purpose be read as follows: "The real, personal, or movable property to be included in an account shall be property of the following descriptions, namely, (*a*) Any property . . . . taken under a disposition . . . . made by a person dying after the first August, 1894, purporting to operate as an immediate gift inter vivos . . . . which shall not have been bonâ fide made twelve months before the death of the deceased"—the clause does not apply to the present case—"or property taken under any gift whenever made"—this means whether made within or without twelve months before death—"of which property bonâ fide

(1) [1898] 2 Q. B. 147.

possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." In my judgment the meaning of the section is that if there be a gift, no matter when made, of property inter vivos, then the property must be included in an account, and therefore liable to estate duty, unless the donee has bonâ fide assumed possession and enjoyment of the property immediately upon the gift, and has thenceforward retained the possession and enjoyment thereof to the entire exclusion of the donor, or if he has taken and retained the possession to the entire exclusion of the donor, then that this possession and enjoyment has been without any benefit by contract or otherwise to the donor. To escape estate duty both these events must concur. This being my opinion as to the true construction of s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, as it now stands incorporated into s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, how upon the facts of the case can it be said that the present Earl, the donee, has either bonâ fide assumed possession of the estate immediately upon the gift, or has thenceforward retained "the possession and enjoyment of the property contained in the deed of the 19th October, 1885, to the entire exclusion" of the late Earl, the donor, or that he has done so without any benefit by contract or otherwise accruing to the donor, the late Earl? That the present Earl, the donee, contracted with the late Earl, the donor, to pay him 4000*l.* a year as well as to bear the other liabilities of the late Earl, as appears by the deed of October 19, 1885, for the benefit of the late Earl, cannot be disputed, and whichever limb of the sub-sections be taken, in my judgment the case comes within it, and therefore falls within the definition of property deemed to pass within s. 2, sub-s. 1 (*c*), of the Act of 1894, and consequently is liable to estate duty.

It was argued by the Crown that the case also falls within clause (*c*) of s. 38, sub-s. 2, of the Customs and Inland Revenue Act of 1881, and that under that sub-section the property was chargeable with estate duty as being property which was deemed to pass within s. 2, sub-s. 1 (*c*), of the Act of 1894.

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This may well be so; but as, in my opinion, s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act of 1881 is fatal to the appellant, the present Earl, it is unnecessary in this case to give a judgment as to the meaning of sub-s. (*c*), and therefore I say nothing about it.

In my judgment the Crown succeeds, and the appeal must be dismissed with costs.

RIGBY L.J. read the following judgment:—The grant and assignment made by the third Earl to the present Earl by the deed of October 19, 1885, was subject, first, as to all the hereditaments other than such part as the third Earl would occupy and enjoy under the trusts thereinafter declared, to an annual rent-charge issuing thereout of 4000*l.*; secondly, as to the hereditaments not charged with the 4000*l.* a year, and the personal property connected therewith, to a beneficial interest in the third Earl; thirdly, to a covenant by the present Earl to pay at the death of the third Earl all the funeral and testamentary expenses, and also all the debts of the third Earl to the full exhaustion of all the property real and personal of the third Earl; fourthly, to a conditional power of revocation by the third Earl.

It is plain, in my judgment, that under the above-mentioned heads benefits were secured to the third Earl which made it impossible for the donee to assume or thenceforward retain the subject-matter of the gift to the entire exclusion of the third Earl or of any benefit to him by contract or otherwise. The benefits under heads 1 and 2 are so plain as to require no further notice. Under head 3 it would have been open to the third Earl by the mere process of incurring debts and spending the sums borrowed, or by borrowing for the purpose of settling the sums borrowed, and actually settling them in favour of other persons, to make the present Earl liable to the full amount of the benefit taken by him under the deed. This would clearly be a benefit to the third Earl arising, at any rate, by contract, if not by way of charge, upon the property granted and assigned. Although the power of revocation is not absolute, it cannot be doubted that the possibility of its being exercised

was also a benefit to the third Earl, not so great as if the power were unconditional, but which might be measured by the extent to which it derogated from the value to the present Earl of the property granted and assigned, which would be very considerable. From the execution of the deed of 1885 down to September 26, 1894, there was no moment of time in which the property for the time being subject to the deed of 1885 was held by the donee to the exclusion of any benefit to the third Earl. The deed of September 26, 1894, only varied this state of things by releasing the benefits arising under heads 1 and 4, leaving those under heads 2 and 3 in full force.

I do not see how it would be possible to avoid the conclusion that the whole subject-matter of the gift, so far as it existed at the death of the third Earl, would have been liable to be included in an account under s. 38 of the Act of 1881, sub-s. 2 (*a*), amended as in the Act mentioned. It does not seem to me to be necessary to determine whether in the present case sub-s. 2 (*c*) of s. 38 of the Act of 1881, amended as mentioned in the Finance Act, is or is not applicable.

The result is that all property granted or assigned by the deed of 1885, and existing at the death of the third Earl, is to be deemed to have passed on his death, and therefore to be liable to estate duty.

VAUGHAN WILLIAMS L.J. read the following judgment:— This is a case of some difficulty. There are several grounds upon which the Crown contends that the property in question is liable to estate duty under the Finance Act, 1894, as property passing on the death of a deceased. By the Finance Act, 1894, s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include . . . . (*c*) property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

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By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, "The personal or moveable property to be included in an account shall be property of the following descriptions." I need not read it at length: it may be taken as having been read. Clause (*a*) relates to donatio mortis causâ, and clause (*c*) says: "Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property." Then by the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, "sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows." Then (*a*), the amendment clause—I need not read the early part of it—concludes: "and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

Now, it is argued on behalf of the Crown that the property in question is liable to estate duty, first, as being property passing under a voluntary settlement whereby an interest in such property for life or some other period terminable by reference to death is reserved expressly or by implication to the settlor, or whereby the settlor has reserved to himself the right to restore to himself or to reclaim the absolute interest in such property. Secondly, it is argued that the property is liable to estate duty as being property taken under a gift whenever made, of which property bonâ fide possession and enjoyment has not been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

Now, with regard to the first ground, the difficulty suggested on behalf of the appellant is that the property has not passed

under a "voluntary settlement" within the meaning of clause (*c*) of sub-s. 1 of s. 2 of the Finance Act of 1894, that is to say, that the instrument passing the property of the late Earl Grey is not a voluntary settlement within the meaning of s. 38 of the Act of 1881 as a section enacted by reference in the Finance Act, 1894, and controlled by the definition in s. 22 of the Finance Act, 1894.

Now, with regard to the second ground, the difficulty suggested by the appellant is this, that the donee did "immediately upon the gift and thenceforward" assume possession and enjoyment of the whole of the property included in the gift, to the entire exclusion of the donor or of any benefit to him, because the annual rent-charge of 4000*l.* a year is not part of the property included in the gift, but an estate prior to and overriding the gift, and because the covenant by the donee to pay all the debts of the donor to the full exhaustion of all his real and personal property is not an admission of the donor to any possession or enjoyment of the property included in the gift, or of any benefit to him, the donor, therein, and because that covenant by the donee does not amount to the admission of the donor to the enjoyment of the property or to any benefit thereout, and certainly does not amount to a charge thereon in favour of the late Earl.

These difficulties are serious. It may be that they can be got over when the meaning of the words in the Finance Act are properly construed—indeed, I am going to a certain extent so to hold—but, in my judgment, you have no right in the construction of that Act to say, as I understand the counsel for the Crown to invite us to do, that in a particular case property is subjected to estate duty although such property does not fall within the words of the Act imposing the duty if construed literally, because the whole gist and scope of the Act leads to the inference that it is impossible that property of the character in question should have been intended by the Legislature to be excluded from liability to the duty imposed by the statute, and you have no right to refuse to give effect to a definition in the Finance Act on the ground that the context requires that a different meaning should be given to the words, the subject

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of the definition, from that contained in the definition, if the only ground for refusing to give to the word the meaning according to the definition is that so to do would be to defeat what appears to be the general intention of the Act of Parliament. I will say no more on this point, because I do not mean to decide it, but I prefer to base my judgment on the gift of property in the present case falling within the later words of sub-s. 1 of s. 11 of the Act of 1889. Now, even apart from the rent-charge, the decision in *Crossman and Another* v. *Reg.* (1) shews that the covenant for the payment by the donee of the donor's debts would be a reservation of an interest within the meaning of s. 38 of the Act of 1881, because it was held in that case that the covenant of the donee to pay the donor for his life interest at 4 per cent. on the capital value of the personalty transferred by the gift was the reservation of an interest within the meaning of s. 38, and it seems to me that the fact that the covenant to pay the donor's debts is not an interest or benefit determinable on death does not prevent the decision in *Crossman's Case* (1) applying to shew that the covenant to pay the donor's debts is the reservation of an interest, although not an interest determinable on death, and as such negatives the exclusion of the donor from any benefit in the property the subject of the gift; and I therefore concur in the judgment of the Court below on the ground that in this case there was a gift of the property within the meaning of the section in the Act of 1889, and that the donee was not intended to, and did not in fact, assume possession and enjoyment to the total exclusion of benefit to the donor. Such an interest is totally different from the prior estate created by the use in respect of the rent-charge, and I mention this because I am inclined to agree with the appellant that the rent-charge must be treated as something entirely outside the gift.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Flux & Leadbitter.*

(1) (1886) 18 Q. B. D. 256.

A. M.

In re ATHLUMNEY.
Ex parte WILSON.

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June 20;
July 18;
Aug. 12.

Bankruptcy—Scheme of Arrangement—Debt carrying Interest exceeding 5 per cent.—The Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*Construction—Retrospective Effect.*

The Bankruptcy Act, 1890, which was passed on August 18, 1890, and came into operation on January 1, 1891, provides (s. 23) that where a debt, including interest, "has been proved" on a debtor's estate, such interest shall for the purposes of dividend be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts have been paid in full:—

Held, that the section was not retrospective in its operation, and therefore did not apply to a debt, including interest above 5 per cent., proved under a scheme adopted by the Court before the date of the passing of the Act.

Semble: If the scheme had been adopted between the dates of the passing of the Act and of its coming into operation, the section would have applied.

THIS was an application which raised the question whether s. 23 of the Bankruptcy Act, 1890, is retrospective in its operation.

On January 31, 1890, a receiving order was made against the debtor, and at the first meeting of the creditors held on April 15, 1890, the debtor proposed and the creditors accepted a scheme of arrangement, which provided (inter alia):—

"(1.) That the property of the debtor divisible amongst his creditors shall vest in the trustee hereafter appointed for administration as in bankruptcy subject to the provisions of this scheme, and that before approval of this scheme by the Court the debtor shall execute in favour of the trustee a deed embodying the terms of this scheme.

"(4.) That all debts directed to be paid in priority to other debts in the distribution of the property of a bankrupt shall be so paid by the trustee under this scheme out of the property of the debtor. . . .

"(5.) That . . . . the trustee shall distribute the net proceeds

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of the debtor's property among the creditors in accordance with the law of bankruptcy.

"(7.) That upon the Court approving this scheme, Mr. L. Hasluck shall be the trustee thereunder."

In May, 1890, the scheme was duly confirmed at the second meeting of the creditors; and on the following June 23 the debtor, in pursuance of the scheme, executed a deed of assignment for the benefit of his creditors, and also a disentailing assurance.

On June 25, 1890, the scheme was approved by the Court, and the receiving order was rescinded, and L. Hasluck became the trustee under the scheme.

By the deed of assignment certain properties were conveyed to L. Hasluck upon trust for sale and conversion; and it was thereby declared that the trustee for the time being of the deed should stand possessed of the net proceeds of sale upon trust, in the first place, to pay and retain thereout costs and expenses as therein mentioned, "and in the next place to pay all claims which are by law entitled to be paid in full or priority to other debts in case of bankruptcy, and to pay, divide, and distribute the residue of the said moneys rateably unto and among the creditors of the said debtor who are entitled to prove against his estate under the said receiving order and upon the amounts for which they are entitled to prove by such instalments and at such times as the committee of inspection shall direct."

Among the proofs tendered against the debtor's estate was one by Robert Morris, a money-lender, which was sworn on April 12, 1890, claiming the sum of 10,153*l.* 1*s.* 8*d.*, and was admitted for voting at that sum on April 15, 1890.

On June 30, 1893, Robert Morris assigned his debt of 10,153*l.* 1*s.* 8*d.* to C. H. Wilson for value.

In 1897 a dividend became payable out of the estate, and the trustee, being advised that s. 23 of the Bankruptcy Act, 1890 (1),

(1) Sect. 23 of the Bankruptcy Act, 1890, enacts, "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the

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which was passed on August 18, 1890, and came into operation on January 1, 1891, was retrospective in its operation, applied to C. H. Wilson, as assignee of Robert Morris, for particulars of the debt of 10,153*l.* 1*s.* 8*d.*, it being admitted that a large part of the debt was for interest at a rate exceeding 5*l.* per cent. per annum.

Thereupon C. H. Wilson applied to the Court for a declaration that he was entitled, as assignee of Robert Morris, to payment of all dividends already declared or thereafter to be declared on the full amount of the proof of debt for 10,153*l.* 1*s.* 8*d.*

Reed, *Q.C.*, and *F. Mellor*, for the motion. The question is whether s. 23 of the Bankruptcy Act, 1890, is retrospective in its operation. The scheme was adopted and became operative before the Act was passed, and upon the proper construction of the Act, the section does not apply. No doubt the section can be read either way; but to make it retrospective will obviously alter the rights of the creditor to his detriment, and the general rule is that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language: *Young* v. *Adams*. (1) In bankruptcy all proofs are made under the principal Act. Here the scheme is the operative contract between the debtor and his creditors; and on June 25, 1890, when it was sanctioned by the Court, Morris acquired a vested right to receive dividends on his proof equally with the other creditors. The case is not unlike *In re Joseph Suche & Co., Limited* (2), where it was held that s. 10 of the Judicature Act, 1875, was not retrospective, and did not apply to the case of a winding-up of a company commenced before the commencement of the Act. *Hough* v. *Windus* (3), *In re Home* (4), and *In re Waverley Type Writer* (5) are other illustrations of the same rule.

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right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full."

(1) [1898] A. C. 469.
(2) (1875) 1 Ch. D. 48.
(3) (1884) 12 Q. B. D. 224.
(4) (1885) 54 L. T. 301.
(5) [1898] 1 Ch. 699.

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Tindal Atkinson, Q.C., and *Herbert Jacobs*, for the trustee. No question arises upon the authorities cited; the case depends upon the true construction of the section itself. Read grammatically, the section is clearly retrospective and express in its terms. The governing words are "where a debt has been proved," not "is," or "shall be" proved. The difference between "has been" and "shall be" is pointed out by Lord Esher in *Bourke* v. *Nutt*. (1) It is submitted that the section means "where at the date of the passing of this Act a debt has been proved," then the section is to apply. It operates on proofs that have been already made. If it were intended to operate only on proofs made after the Act, other words would have been used. The section does not destroy the right of proof at all: it only restricts the right to share in the distribution of the assets. In *Ex parte Pelly* (2) it was held that s. 4 of the Companies Act, 1883, which incorporates the rule in bankruptcy as to preferential payments into the winding-up of a company, was retrospective and applied to a company the liquidation of which had commenced before the passing of the Act.

Reed, Q.C., in reply.

Cur. adv. vult.

Aug. 12. WRIGHT J. In the early part of 1890 the debtor failed, and his estate was on June 23 of that year assigned for the benefit of his creditors under a scheme accepted by his creditors on the previous April 15, and on June 25 approved by the Court, which provided for "administration as in bankruptcy subject to the provisions of this scheme," and directed that, subject to payment of debts "directed to be paid in priority to other debts in the administration of the property of a bankrupt," and subject to certain other expenses, the trustee should "distribute the net proceeds of the debtor's property among the creditors in accordance with the law of bankruptcy." The assignment which was executed in pursuance of the scheme declared a similar trust, first for expenses, next "to pay all claims which are by law entitled to be paid in full in priority to other debts

(1) [1894] 1 Q. B. 725, at p. 733. (2) (1884) 50 L. T. 754.

in cases of bankruptcy, and to pay, divide, and distribute the residue of the said moneys rateably unto and among the creditors of the said debtor who are entitled to prove against his estate under the said receiving order and upon the amounts for which they are entitled to so prove." Mr. Morris, a creditor in the present case, proved for a debt which carried interest at a rate exceeding 5 per cent. Afterwards, on August 18 of the same year, the Bankruptcy Act, 1890, was passed, with a section postponing its operation until January 1, 1891. Sect. 23 of that Act enacts as follows: "Where a debt has been proved upon a debtor's estate under the principal Act, and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per centum per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full." And the question is whether this enactment operates so as to govern the distribution of dividend under a contract made under a scheme which had taken effect before the Act was passed or came into operation.

For the applicant it is argued that the section operates only on bankruptcies occurring or schemes taking effect after the commencement of the Act; and further, that in any case the scheme ought to be construed as a contract for distribution of the estate according to the Act which was in force at the time when the scheme was adopted and took effect. The latter of of these contentions ought not in my opinion to prevail if it stood alone. In the absence of any express provision in the scheme for this particular matter, I think that the scheme must be construed as applying the bankruptcy law for the time being in force or to be in force, in so far as such law may not be inconsistent with the express provisions of the scheme or excluded by any rule of law or rule of construction; and if this view is correct, the only question is whether there is a rule of construction which prevents the section from being interpreted as operating retrospectively. Perhaps no rule of construction

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is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. Some of the many authorities for this proposition are *Main* v. *Stark* (1), per Lord Selborne (2); *Gilmore* v. *Shuter* (3), on the Statute of Frauds; *Moon* v. *Durden* (4), on the Gaming Acts; *Hickson* v. *Darlow* (5), on the Bills of Sale Acts; *Waugh* v. *Middleton* (6), an extreme case, but not disapproved of in *Larpent* v. *Bibby* (7); *Williams* v. *Harding* (8); *Hough* v. *Windus* (9) and *Ellis* v. *McCormick* (10), on the Bankruptcy Acts; and *In re Joseph Suche & Co., Limited* (11), on s. 10 of the Judicature Act, 1875. In the last-mentioned case Jessel M.R. said: "Since this question came last before me I have consulted several of the other judges"; and, referring to s. 10 of the Judicature Act, 1875, he said: "I prefer on this occasion to rest my decision on the more general grounds that the section was not intended to apply to any case of a winding-up which had been commenced before the Act came into operation. I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception. I am of opinion that it is not. This is an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a

(1) (1890) 15 App. Cas. 384.
(2) 15 App. Cas. at p. 387.
(3) (1677) 2 Mod. 310; 2 Jones, 108.
(4) (1848) 2 Ex. 22.
(5) (1883) 23 Ch. D. 690.
(6) (1853) 8 Ex. 352.
(7) (1855) 5 H. L. C. 481.
(8) (1866) L. R. 1 H. L. 9.
(9) 12 Q. B. D. 224.
(10) (1869) L. R. 4 Q. B. 271.
(11) 1 Ch. D. 48.

right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation." One exception to the general rule has sometimes been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in *Moon* v. *Durden*. (1) Moreover, ss. 6 and 8 of this Act have been held not to be retrospective, notwithstanding, though without reference to this suspensory clause: see *Re Raison* (2) and *Reg.* v. *Griffiths*. (3) In the present case the enactment does not merely affect procedure. If the section is construed retrospectively, it will postpone the creditor's right to dividend beyond 5 per cent., and will pro tanto deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred. Then is the section so expressed as to be plainly retrospective? No doubt the words "where a debt has been proved under the principal Act" are capable of such a meaning. But this form of words is often used to refer, not to a past time which preceded the enactment, but to a time which is made past by anticipation—a time which will have become a past time only when the event occurs on which the statute is to operate. In former times draftsmen would have used the words "where a debt shall have been proved," but in modern Acts the past tense is frequently used where no retrospective operation can be intended. In *Moon* v. *Durden* (1) even the phrase last mentioned was held not retrospective. It seems to me that the case for the trustee cannot be put higher than this—that either construction is possible; but if so, the authorities to which I have referred shew that retrospective force ought not to be given to the section.

It is not necessary in the present case to decide whether the section would apply where the original contract was made

(1) 2 Ex. 22. (2) (1891) 63 L. T. 709.

(3) [1891] 2 Q. B. 145.

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before the passing or commencement of the Act, but a scheme is adopted and approved after the commencement of the Act. In such a case the question would probably depend on the provisions of the scheme as approved, and if a creditor in such a case assented without qualification to a scheme which according to its ordinary construction attracts the existing bankruptcy law, he might probably be held to have waived any right which he might otherwise have to stand upon his original contract.

It should be observed that by s. 31 of the Act of 1890 that Act and the Act of 1883 are to be construed as one Act. This enactment, however, cannot have the effect of making the provisions of the Act of 1890 operative as from 1883; nor could it be so held consistently with the cases above cited of *Re Raison* (1) and *Reg.* v. *Griffiths.* (2) The motion, therefore, must be allowed with costs.

Solicitors for applicant: *Collyer-Bristow, Russell & Co., for Laverack & Son, Hull.*

Solicitors for trustee: *Cross & Guedalla.*

(1) 63 L. T. 709. (2) [1891] 2 Q. B. 145.

H. L. F.

[IN THE COURT OF APPEAL.]

C. A.
1898
July 28.

SIMCOE *v.* PETHICK.

Inclosure Acts—Allotment for Turbary—Legal Estate in Land—Compensation to Lord of the Manor—Inclosure Act, 1845 (8 & 9 *Vict. c.* 118), *ss.* 34, 73, 76.

An allotment of land made in pursuance of ss. 34 and 73 of the Inclosure Act, 1845, to the churchwardens and overseers of a parish in trust to allow the occupiers of certain ancient cottages in the parish to get turf therefrom vests the legal estate in the land in the churchwardens and overseers.

Attorney-General v. *Meyrick*, [1893] A. C. 1, and *Reg.* v. *Inclosure Commissioners*, (1871) 23 L. T. 778, distinguished.

APPEAL from the judgment of a Divisional Court (Day and Lawrance JJ.) affirming the judgment of the judge of the county court held at Launceston.

The action in the county court was for trespass upon a piece of land situated in the parish of Egloskerry, in the county of Cornwall, and formerly part of certain common lands called Tregeare Down and Redd Down, which had been inclosed under the Inclosure Act of 1845.

By a provisional order made in 1846 by the Inclosure Commissioners for England and Wales under that Act, after reciting that persons interested in certain land called Tregeare Down and Redd Down, situate in the parish of Egloskerry, in the county of Cornwall, being land subject to be inclosed under the Act passed in the 8th and 9th years of the reign of Her present Majesty, and proposing to inclose the same under the said Act, had made due application to the Inclosure Commissioners for England and Wales to sanction such inclosure, the commissioners declared that the following were the terms and conditions on which they were of opinion that the proposed inclosure should be made, namely, that two acres of the land as described in the order and marked A on the plan thereunto annexed should be allotted for the purposes of exercise and recreation, that four acres adjoining thereto and marked B on the plan should be allotted for the labouring poor, and further that the valuer acting in the matter

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should be authorized to allot for the purpose of turbary ten acres of the said Tregeare Down to the north of the stream between Tregeare and Redd Down and marked C on the plan for the benefit of the inhabitants of the village of Tregeare, and thirty acres of the said Redd Down to the north of the parish road and twenty acres to the south of the said road and marked C C on the plan for the benefit of the inhabitants of the village of Egloskerry and Badharlic, and further that the valuer should be authorized to allot for the repair of the roads certain stone quarries as described in the order, and further that five forty-eighths of the said land proposed to be inclosed should, subject to the provisions of the said Act, be allotted to the Rev. Henry Addington Simcoe (the lord of the manor) as owner of the soil of the said land in respect of his right and interest therein inclusively of all mines, minerals, stone, and other substrata under the said downs and of all other his right and interest as owner of the soil of the said land.

The award made by the valuer acting in the matter in 1848, after setting out the pieces of land for exercise and recreation and for allotments for the labouring poor of the parish as provided for in the provisional order, proceeded as follows: "And I do hereby declare that I have set out, and allotted, and and by these presents do set out, allot, and award unto the said churchwardens and overseers of the poor of the said parish of Egloskerry the allotments next hereinafter mentioned for the purposes of the exercise of rights of turbary." Then followed the description of various allotments on Tregeare Down and Redd Down, and with regard to the latter the award provided that they should be "held by the said churchwardens and overseers of the poor and their successors for ever upon trust to permit the occupiers of the ancient cottages in the said parish of Egloskerry having the right of turbary on Redd Down aforesaid to cut and dig turf thereon and to carry away the same under such regulations as may from time to time be laid down." Then followed a provision for the making of regulations as to the exercise of the rights of turbary by the churchwardens and overseers of the parish. The award then further proceeded as follows: "I have also according to the directions of the pro-

visional order of the said commissioners set out unto the Rev. Henry Addington Simcoe as owner of the soil of the land in respect of his right and interest therein inclusive of all mines, minerals, stone, and other substrata under the land to be inclosed all those three pieces or parcels of land numbered " (describing them) " which I adjudge and declare to be equal in value to five forty-eighth parts of the residue of the said Downs, and I further declare that I have set out and allotted, and by these presents do set out, allot, and award all the remainder of Tregeare Down and Redd Down aforesaid among the several persons hereinafter named, being all the persons entitled to allotments thereon, respectively in the shares and allotments following, set opposite to their respective names, which allotments I have adjudged and determined to be proportionate to the value of the respective rights and interests of such persons which have been claimed and allowed under the provisions of the said last mentioned Act." Then followed a schedule of allotments. The award was duly confirmed by the commissioners. The plaintiff was the lord of the manor. The defendant had entered and cut underwood upon one of the allotments on Redd Down made as above mentioned to the churchwardens and overseers of the parish of Egloskerry for the exercise of rights of turbary, which was the trespass complained of in the action. The defendant failed at the trial to make out any title to do the acts complained of, but contended that the plaintiff was not the owner of the land, which belonged to the churchwardens and overseers of the parish, and the plaintiff was therefore not entitled to maintain the action. The county court judge held, on the authority of *Attorney-General* v. *Meyrick* (1) and *Reg.* v. *Inclosure Commissioners* (2), that the legal estate in the land remained vested in the plaintiff notwithstanding the award, and therefore the plaintiff was entitled to maintain the action. He accordingly gave judgment for the plaintiff for 5*s.* damages.

Rawlinson, Q.C., for the defendant. The scheme of the Inclosure Act, 1845, is that the ownership of the soil in the

(1) [1893] A. C. 1. (2) 23 L. T. 778.

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various allotments other than those made to the lord of the manor, including those made for public purposes, shall be taken away from the lord and vested in the various allottees, the lord receiving an allotment of land by way of compensation for the loss of his ownership of the soil in the remainder of the land inclosed. The award of the valuer, which upon confirmation by the Inclosure Commissioners became under ss. 104, 105 of the Act unimpeachable, must be construed with regard to the provisions of the Act. It clearly vests the soil of the piece of land in question in the churchwardens and overseers of the parish, giving to the lord of the manor certain allotments by way of compensation in respect thereof and of the other allotments made to persons other than himself. Having regard to the provisions of ss. 34 and 73 of the Act the valuer had no power to allot or award a mere incorporeal right of turbary. By s. 73 the land allotted for the purpose of turbary is to be held by the churchwardens and overseers of the parish as parish land, clearly implying that the land itself is to be vested in them.

J. E. Bankes, for the plaintiff. The legal estate in this land remains in the lord of the manor. This case is governed by the decision of the House of Lords in *Attorney-General* v. *Meyrick* (1) and by *Reg.* v. *Inclosure Commissioners*. (2) It is true those cases were not decided upon the Inclosure Act, 1845, but it is submitted that the principle upon which they were decided applies to the present case. Those cases shew that the terms "set out" and "allot" as used in an Inclosure Act do not necessarily involve a conveyance of the legal estate in the land, but may only create an incorporeal right such as a right of turbary. The lord is not compensated for the soil of the land appropriated for public purposes under s. 34. It is contended that the words "set out and allot" do not involve a conveyance of the land itself unless the context and the requirements of the case shew that they are intended to do so. It is submitted that all that is vested in the churchwardens and overseers by the award is the right of turbary in trust for the inhabitants of the ancient cottages in Egloskerry. Where there

(1) [1893] A. C. 1. (2) 23 L. T. 778.

is an allotment of land, there is a direction in s. 94 of the Act that it shall be held on the same tenure as the land in respect of which it is made. This would not apply to the case of the land to be held by churchwardens and overseers for public purposes under s. 73. Sect. 73 only deals with the way in which whatever is given for public purposes is to be dealt with and administered. It does not extend or define the grant. It only says that that which is granted by the award to the churchwardens and overseers is to be dealt with like parish land. If the grant is only for a trust for the public benefit which does not require the legal ownership of the soil, the legal estate remains in the lord. The only effect of the allotment is to make him a trustee for the purpose of permitting the land to be used as a turbary by the occupiers of certain cottages. Such use does not involve the ownership by the churchwardens and overseers of the legal estate in the soil, or exhaust all the beneficial interest in the land. The compensation to the lord of the manor is provided for by s. 76. It is contended that the meaning of that section is that out of the residue of the land which remains after the making of the allotments for public purposes under s. 34 the lord is to have, by way of compensation for the loss of ownership of the soil in that residue, an allotment proportionate to his interest therein, i.e., in the residue. The words "therein" and "the said land" in the section refer to that residue. The scheme of the Act is that only small portions of the land are to be allotted for public purposes, and that the lord is not to be compensated in respect of them. This shews that nothing of substantial value was intended to be taken from him by the allotments for public purposes. The residue of the land is to be allotted in severalty, and the lord is to be awarded compensation in respect of that which is so allotted to persons other than himself. The lord not receiving any compensation in respect of the ownership of the soil in the allotments for public purposes, it would not be reasonable to conclude that the effect of the award is to deprive him of the ownership of the soil where that is not necessary for the public purpose for which the allotment was made.

Rawlinson, Q.C., was not called upon to reply.

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A. L. SMITH L.J. The question raised by this appeal is whether the plaintiff is the owner of the piece of land in question and therefore the person entitled to maintain an action of trespass against the defendant in respect of the acts committed by the defendant thereon. The land in question previously to the year 1848 formed part of certain uninclosed land in the parish of Egloskerry in Cornwall, the soil of which belonged to the lord of the manor, and over which the occupiers in the parish had certain rights of turbary and other rights. This land was inclosed under the provisions of the Inclosure Act, 1845, and upon the construction of that Act the question which we have to decide substantially depends. By the award made by the valuer appointed for the purposes of the inclosure under the Act, after allotting certain pieces of land for exercise and recreation and for allotments for the labouring poor, which he had power to do under s. 34 of the Act, he proceeded to "set out, allot, and award unto the churchwardens and overseers of the poor of the parish of Egloskerry" certain pieces of land, one of which was the piece of land in question, for the purposes of the exercise of the right of turbary, and with regard to the land in question he declared that it should be held by the said churchwardens and overseers of the poor and their successors for ever upon trust to permit the occupiers of the ancient cottages in the said parish of Egloskerry having the right of turbary on Redd Down aforesaid to cut and dig turf thereon and to carry away the same under such regulations as might from time to time be laid down. The question is in whom the ownership of the soil of that allotment has since that award been vested: whether it is vested in the churchwardens and overseers or remains in the lord of the manor. The answer to that question appears to me to depend on the true construction of the Inclosure Act, 1845. By s. 73 of that Act, after provisions with regard to land allotted for exercise and recreation and for allotments for the labouring poor, it is provided that "the said valuer shall in like manner, in pursuance of the directions of or in any manner not inconsistent with the directions of such provisional order . . . . as aforesaid set out and allot for the other public purposes men-

tioned in such provisional order . . . . such parts of the land to be inclosed as shall have been thereby respectively directed to be set apart for such purposes, and such allotments shall be made to such persons respectively . . . . as the valuer with the approbation of the commissioners shall direct: and in every case in which the valuer, with such approbation of the commissioners, shall not think it necessary or proper to direct the same to be otherwise made, such allotments shall be made to the churchwardens and overseers of the poor for the time being of the parish in which such allotments shall be situate; and all allotments which shall be made to the churchwardens and overseers under this Act shall be held by the churchwardens and overseers of the poor for the time being in the same manner and with the same legal powers and incidents as if the same allotments were lands belonging to the parish, but in trust nevertheless for the purposes for which the same shall be allotted." The question is whether after an allotment made to the churchwardens and overseers in accordance with that section the soil of the land continues to belong to the lord of the manor or belongs to the parish. If the latter, then it follows that the plaintiff, the lord of the manor, has no right to maintain this action of trespass in respect of the land in question. It appears to me clear from the provisional order and award which were framed in pursuance of s. 76 that the lord of the manor has had compensation in respect of the soil of this land including the minerals. I cannot read s. 76 of the Inclosure Act, 1845, as suggested by the counsel for the plaintiff. That section provides that "after the several allotments hereinbefore directed" (i.e., allotments for recreation and other public purposes) "shall have been set out and made, and after making provision for the payment of the expenses by sale of land in case the expenses shall be so directed to be paid, the valuer acting in the matter of any inclosure shall allot and award unto the lord of the manor so much and such part of the land proposed to be inclosed as shall in the judgment of the valuer be equal (quantity and value considered) to such a part of the residue of such land as shall be proportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in

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lieu of his right and interest in the soil of the said land, &c." I read the words "therein" and "the said land" as meaning the land proposed to be inclosed. Therefore, in my opinion the lord of the manor must be taken as having had compensation in respect of the soil of this land. That being so, what is the meaning of "allotting" land under the Act as applied to such an allotment as that in question? Does it mean only allotting a right of turbary leaving the soil still in the lord? I do not think so. I think the whole scheme of the Act is to take the soil out of the lord, he being compensated in respect thereof, and to vest it in the churchwardens and overseers in trust for the parish. I therefore think that the plaintiff cannot maintain this action. We were pressed by the plaintiff's counsel with the case of *Attorney-General* v. *Meyrick*. (1) He contended that the House of Lords decided in that case that an allotment under an Inclosure Act did not necessarily pass the soil to the allottee. But that was not the decision in that case. There lands which originally belonged to the lord of the manor were allotted to him as trustee for the commoners. A railway having taken the land, the question was as to the application of the purchase-money which was paid into court. The House of Lords held, affirming the decision of Stirling J. and the Court of Appeal, that the lord of the manor held the land which had been allotted to him upon a trust, and, that trust not exhausting the beneficial interest in the land, subject to it the lord had the beneficial interest. The grounds of the decision are concisely summed up by Lord Watson, who said: "Having regard to the position of these parties, and the intention of the Legislature as appearing from the language of the Act, I am satisfied that the trust created by s. 13 does not take away the whole beneficial interest of the lord of the manor, but merely constitutes a right of turbary as a burden upon that interest." That case does not cover the present. For these reasons I think that the appeal should be allowed.

RIGBY L.J. I agree. In each of the cases cited to us there was no doubt that the legal estate in the land was vested in the

(1) [1893] A. C. 1.

lord of the manor. In the case of *Attorney-General* v. *Meyrick* (1), so far from the legal estate being taken away from the lord, the land in question, which originally belonged to him, was allotted to him on trust to allow the same to be used as a turf common by the occupiers of certain cottages, who being a fluctuating body were not capable of taking a conveyance of any interest in the land. So also in *Reg.* v. *Inclosure Commissioners* (2) the legal estate in the land in question clearly remained vested in the lord of the manor. The question that arose in those cases was as to the beneficial interest in the land, and no doubt existed that the legal estate was in the lord of the manor. In this case the question is in whom the legal estate is vested. I will not go through the sections of the Act again at length. I concur in the construction which my brother A. L. Smith L.J. has put upon them. In s. 34 we find power given to make allotments for certain public purposes, among which is a supply of fuel for the poor or other inhabitants of the parish, and in s. 73 we find directions as to how such allotments are to take effect. In pursuance of the latter section the valuer by his award sets out, allots, and awards the land in question to the churchwardens and overseers of the parish to be held by them on trust to permit the occupiers of certain ancient cottages to get turf therefrom. The question is whether the land itself is conveyed by that award or only an incorporeal hereditament in it. Assuming that, as contended, the word "allot" may be ambiguous, the word "award" is clearly an apt word for conveying the land. But, independently of the clear language of the award and the difficulty of going behind it, having regard to the provisions of ss. 104, 105 of the Act, I think that the award must be taken to deal with the land itself, and not merely with an incorporeal hereditament in it, for the following reasons. Whatever the construction of the section with regard to the compensation to the lord of the manor may be, it appears to me, upon the terms of s. 73 and the provisional order, that, unless the valuer who made the award exceeded his jurisdiction, he must have allotted the land itself. I think that he was simply following the directions given him by the Act

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and the provisional order by making an actual conveyance of the land to the churchwardens and overseers of the parish. But, furthermore, I think it reasonably clear that the lord must be taken to have received compensation in respect of the land in question. Sect. 76 of the Act is not expressed in the clearest terms, but I think it is reasonably clear upon the terms of it that the compensation made to the lord of the manor under that section is to be compensation for all the interest of which he has been deprived in the land to be inclosed. The valuer is, after the several allotments thereinbefore directed shall have been set out and made, and after making provision for the payment of the expenses by sale of land, in case the expenses shall be so directed to be paid, to "allot and award unto the lord of the manor so much and such part of the land proposed to be inclosed" (meaning, in my opinion, the land proposed to be inclosed whether for public or private purposes) "as shall in the judgment of the valuer be equal (quantity and value considered) to such a part of the residue of such land as shall be proportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in lieu of his right and interest in the soil of the said land." In my opinion the word "therein" means not "in the residue" but "in the land proposed to be inclosed," and the words "the said land" also mean the same thing. I think the intention is that the compensation to be given to the lord is to be compensation for the loss of his interest in the soil of the portions of the land which upon the inclosure are allotted whether for public purposes or to private persons other than himself.

VAUGHAN WILLIAMS L.J. I agree. It was only in view of the newly recognised necessity for establishing a legal title in the plaintiff in this action of trespass that the argument was put forward by the plaintiff's counsel that the allottees of such an allotment as this under the Act of 1845 do not take a legal title. It was a surprise to me to hear it suggested that there was any doubt as to this. I thought in the earlier portion of the argument of the plaintiff's counsel that his contention was, not that the allottees did not get a legal title, but that in this

particular case we ought not to treat the allotment as one of land, but of a right of turbary. I think that is entirely wrong. As soon as the proposition is established that the legal estate in the land is in some person other than the plaintiff there is an end of the action of trespass.

Appeal allowed.

Solicitors for plaintiff: *Bell, Steward, May & Howe, for Peter & Son, Launceston.*

Solicitors for defendant: *Horne & Birkett, for Graham White & Llewellin, Launceston.*

E. L.

JONES *v.* SCULLARD.

1898
April 29;
Aug. 9.

Master and Servant—Servant of one Person hired by another to Drive his Carriage—Liability of Hirer for Negligence of Driver.

The defendant was the owner of a brougham, horses, and harness which he kept at a livery-stable. The keeper of the livery-stable was in the habit of supplying the defendant with one of his own servants to drive the brougham. One day, whilst the brougham was being driven with one of the defendant's horses, the driver, owing to his negligence, as the jury found, lost control of the horse, which dashed through the window of the plaintiff's shop and did damage. The man who was driving the brougham at the time of the accident had continuously driven the defendant for the preceding six weeks, and at the time of the accident was wearing a suit of livery which had been supplied to him by the defendant.

Held, that upon these facts there was evidence on which a jury might find that the driver at the time of the accident was acting as the servant of the defendant, so as to render the defendant responsible for the consequences of his negligence.

FURTHER consideration before Lord Russell of Killowen C.J. after trial with a jury.

The plaintiff was a jeweller carrying on business at 368, Holloway Road. On June 22, 1897, the day of the Queen's Jubilee, whilst the defendant was being driven in his brougham in the Holloway Road, the driver of the brougham lost control of the horse, which bolted and dashed through the window of the plaintiff's shop, doing considerable damage. The plaintiff sued the defendant for his loss, which he claimed to have been

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caused by the negligence of the driver. The evidence shewed that the horse which was being driven in the brougham was a hard-mouthed horse and a puller, and that the driver ought to have known that fact by inspection of its mouth, which shewed signs of hardness caused by pulling; that the reins ought consequently to have been fastened to the bar, whereas they were improperly fastened to the cheek of the bit; that the curb was not sufficiently tightened, and that it was by reason of this adjustment of the reins and curb that the driver lost control of the horse. It appeared that the brougham, the horse, the harness, and the suit of livery which the driver was wearing were the property of the defendant; but the driver, a man named Loveday, was a coachman in the employment of a livery-stable keeper named Walker, at whose stable the defendant kept the brougham and horse. The defendant had kept his horses and carriage at livery at Walker's stable since January 3, 1897. He first began to be driven by Loveday on May 10; but from that date down to the time of the accident Loveday invariably drove for him. After Loveday had driven for him a short time, between May 24 and May 31, the defendant supplied him with the suit of livery which he was wearing at the time of the accident. The particular horse which caused the accident had only been recently purchased by the defendant in the country, and was first brought up to London on June 14, between which date and June 22 it was driven by Loveday at most some three or four times. The defendant, who disputed that the horse was hard-mouthed or improperly fitted, also contended that, even if it were, he was not responsible, on the ground that Loveday was not his servant, but was the servant of Walker, the livery-stable keeper. The Chief Justice left to the jury the question of negligence only. The jury returned a verdict for the plaintiff. The question as to the person who was responsible for Loveday's negligence was reserved for further consideration, it being agreed that the judge should have power to draw all necessary inferences of fact.

Hammond Chambers, *Q.C.*, and *Woodin*, for the plaintiff. The test of liability for the negligence of the driver is to whom

did the horse belong. In *Laugher* v. *Pointer* (1), where the owner of a carriage hired horses as well as a driver from a stable-keeper, it was held by Abbott C.J. and Littledale J., Bayley and Holroyd JJ. dissenting, that the former was not liable for the driver's negligence. In such a case it is the stable-keeper who is liable, because he has the control of the horses. Where the driver is driving the stable-keeper's horse he may properly refuse to obey the hirer's order to drive the horse fast when tired, but he could not so refuse where he is driving the hirer's horse. In *Brady* v. *Giles* (2) Lord Abinger C.B. differed from the Court of King's Bench in the last case to the extent of holding that the question whether the stable-keeper or the hirer is liable is in every case a question of fact. A person who hires the services of another's servant for a particular job may by exercising control over the man make him his own servant pro hac vice, and thereby become responsible for his conduct: *Randleson* v. *Murray*. (3) In *Quarman* v. *Burnett* (4) the Court of Exchequer followed the decision of Abbott C.J. and Littledale J. in *Laugher* v. *Pointer* (1) on practically similar facts, the defendants who owned the carriage hiring the horses and the driver. There, after verdict for the plaintiff, the Court set the verdict aside on the ground that there was no evidence that the driver was acting as the defendants' servant. In *Rourke* v. *White Moss Colliery Co.* (5) one W. agreed with the defendants to sink a shaft for them upon the terms (inter alia) that the defendants should supply an engine and engineer (who was employed and paid by them), and that the engine and engineer should be under the control of W. During the sinking of the shaft the plaintiff was injured by the negligence of the engineer. It was held that as the engineer was under the control of W. he was the servant of W., and not of the defendants, and that the defendants were, therefore, not liable. In *Jones* v. *Corporation of Liverpool* (6) one D. contracted with the defendants to supply by the day a driver and horse to draw a watering-cart of the defendants. The

(1) (1826) 5 B. & C. 547.
(2) (1835) 1 Mood. & Rob. 494.
(3) (1838) 8 A. & E. 109.
(4) (1840) 6 M. & W. 499.
(5) (1877) 2 C. P. D. 205.
(6) (1885) 14 Q. B. D. 890.

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driver was employed and paid by D., and was not under the defendants' control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart, the defendants were held not liable. These cases were followed in *Donovan* v. *Laing, &c., Syndicate.* (1)

[LORD RUSSELL of KILLOWEN C.J. Suppose Messrs. Gunter, the refreshment contractors, were in one case to supply a ball supper including the attendance of waiters, and in another were to supply the waiters only, the supper being provided by the giver of the ball. Would the waiters in either of those cases be acting as the servants of the giver of the ball, so as to render him responsible for their negligence?]

In the latter they would; in the former they would not.

Witt, Q.C., Moyses, and *E. C. Humphreys,* for the defendant. The true test of whether a man stands to another in the relation of master and servant is, Did he select him to do the work? This is the ratio decidendi of the judgment of Littledale J. in *Laugher* v. *Pointer.* (2) He says: "For the acts of a man's own domestic servants there is no doubt but the law makes him responsible, and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is that he is hired by the master either personally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him." And Abbott C.J. (3) lays stress on the fact that "the defendant did not select the driver." And in *Quarman* v. *Burnett* (4) Parke B., in delivering the judgment of the Court, lays stress on the same point. "That person," he says, "is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant, from the knowledge of or belief in his skill and care." In the present case it is clear that Loveday was selected by the stable-keeper Walker, and not by the defendant. The

(1) [1893] 1 Q. B. 629.
(2) 5 B. & C. at p. 553.
(3) 5 B. & C. at p. 572.
(4) 6 M. & W. at p. 509.

distinction between cases in which the horses belong to the hirer of the driver and cases in which they do not was not suggested in *Laugher* v. *Pointer* (1) or *Quarman* v. *Burnett*. (2)

Cur. adv. vult.

Aug. 9. LORD RUSSELL of KILLOWEN C.J. This is a case which has given me considerable anxiety as to how I ought to decide it. It raises a point of importance, which I think it is eminently desirable should be considered in the Court of Appeal.

The question which arises for decision upon the facts of this case is whether the fact that Loveday was undoubtedly in a general sense the servant of Walker and could not be dismissed from Walker's employment by any act of the defendant is sufficient to relieve the defendant from responsibility for the negligence of Loveday while driving him. It is clear upon the authorities that it is not at all impossible for a man to be in the practical relation of servant to two different employers. It is clear that, although Loveday was in the general employment of Walker, he may at the time have been in the particular employment of the defendant, and the servant of the defendant in relation to the particular matter of driving the defendant's carriage. The question is whether he was so.

I will now proceed to examine the leading authorities upon this subject, because I do not hesitate to say that, if it were not for those authorities, I should not have felt the perplexity which I have felt as to how the case should be decided. At the same time, I should add that no one of those cases is, in all essential characteristics, on all fours with the present. In no one of those cases is there the conjunction of all the facts which exist here, namely, the ownership by the defendant of the brougham, the horse, and the harness, the fact that the livery was supplied to the driver by the defendant, and the fact that the horse which was being driven was one to which the driver had not been previously accustomed.

The first of the authorities to which I have referred is

(1) 5 B. & C. 547. (2) 6 M. & W. 499.

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Laugher v. *Pointer*. (1) The point there raised was considered of such importance that it was the subject of consideration, not only by the Court of King's Bench, but also by the whole body of the common law judges. The King's Bench were equally divided, and it was stated by Parke B., when delivering the judgment of the Court of Exchequer in *Quarman* v. *Burnett* (2), that the twelve judges also differed in opinion. Whether they also were equally divided or not I have been unable to ascertain, although I have been at some pains to do so. The decision of the twelve judges is unreported, and a search in the Record Office has, I understand, thrown no further light upon the matter. The report in Barnwall and Cresswell gives the decision of the King's Bench only, and the head-note to that report is as follows: "Where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person: *Held*, by Abbott C.J. and Littledale J., that the owner of the carriage was not liable to be sued for such injury, Bayley and Holroyd JJ. diss." In his judgment Abbott C.J. (3) says: "I must own that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day, and hiring them to draw it for a stage on the road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions and hiring a carriage with them of their owner." With that observation I am disposed to agree. Later on he says (4): "I have acknowledged the difficulty of drawing a line with reference to time or distance; and I think we must look to other circumstances in order to ascertain the obligation of the hirer. Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice, of the coachman." That, I think, is an observation pregnant with good sense. It

(1) 5 B. & C. 547.
(2) 6 M. & W. 499, at p. 507.
(3) 5 B. & C. at p. 577.
(4) 5 B. & C. at p. 580.

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may be that case is well decided; but in my opinion it does not govern the present.

The next case to which I wish to refer is that of *Brady* v. *Giles*. (1) There the defendant, who was a carriage-jobber in London, let on hire to a Mr. M'Kinlay a barouche and four horses for a trip to Windsor and back. The horses were driven by two of the defendant's postilions. On the journey back to town the barouche, owing, it was alleged, to the negligence of the postilions, came into collision with the plaintiff's gig. A question arose at nisi prius as to whether the postilions were acting as the servants of the defendant or of M'Kinlay. Lord Abinger, before whom the case was tried, left the question to the jury, and said that "it had always appeared to him that the Court of King's Bench had pursued an erroneous course in *Laugher* v. *Pointer* (2) when they allowed the question now raised to be discussed as if it were a question of law for the judge to decide. It always appeared to him that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn at which, as a matter of law, the general owner of a carriage, or rather the general employer of the driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances." That appears to me to be a sound view; and it was in consequence of what was there said that in the present case I thought it right that, when reserving this case for further consideration, I should be empowered to draw all proper inferences from the facts.

The next case is *Quarman* v. *Burnett*. (3) There the defendants, two ladies, who kept a carriage, had for a period of about three years been in the habit of hiring for the day or for the drive horses and a coachman from a particular job-mistress. They had during that time always been driven by the same coachman, to whom they paid a small gratuity for each drive. Owing to the negligence of the coachman in leaving the horses unattended while the carriage was standing

(1) 1 Mood. & Rob. 494. (2) 5 B. & C. 547.
(3) 6 M. & W. 499.

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at the door of the defendants' house, the horses started off and came into collision with the plaintiff's chaise. A verdict having been found for the plaintiff, the Court of Exchequer set it aside, on the ground that there was no evidence that the coachman was acting as the servant of the defendants. That case might appear to be an authority in favour of the defendant; but I would point out that its facts differ from those in the present case in two material particulars. In the present case the horse which was being driven was the property of the defendant; and, secondly, not only was it his property, but it was one which he had only recently purchased, and with which consequently the driver supplied by the livery-stable keeper had but an imperfect acquaintance. Both those matters are to my mind material. The materiality of the ownership of the horse lies in this: so long as the hirer contracts with the livery-stable keeper for the supply of a complete equipage to drive him by the day or hour, as the case may be, and the stable keeper in pursuance of that contract supplies carriage, horses, and the man to drive them, the hirer has no control whatever over the driver, except so far as he can indicate the direction in which he wishes to be driven. He could not order him to increase his speed, for the driver might lawfully refuse to do so on the ground that he was acting under his master's orders in driving slowly. But where the hirer of the coachman is himself the owner of the horse, he is entitled to dictate to the driver as to how fast he shall drive, and the driver is bound to take his orders from him. The driver is in that case under the control of the hirer as to the manner of his driving. Then comes the further consideration that the horse was one which had only come into the possession of the defendant a few days before the date of the accident, and had been driven by Loveday an insufficient number of times to enable him to learn the peculiarities of the horse's temper and the manner in which, having regard to that temper, the bit and reins required to be adjusted. Further, although the defendant could not dismiss Loveday from Walker's employment, he could if dissatisfied with his manner of driving refuse to be driven by him. These matters, to my

mind, form elements to be considered in determining the relation of the driver to the defendant.

The only two other cases to which I wish to refer seem directly to support the view which I have taken in the present case. The first of those two cases is *Rourke* v. *White Moss Colliery Co.* (1) There the defendants, having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the defendants to provide and place at the disposal of W. the necessary engine-power with an engineer to work the engine (who was employed and paid by the defendants), the engine and engineer to be under the control of W. The plaintiff, who was one of the men employed and paid by W., while working at the bottom of the shaft was injured by the negligence of the engineer. It was held that, though the engineer remained the general servant of the defendants, yet, being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of the defendants, who were, therefore, not liable for his negligence. That case makes it quite clear that a man may be the general servant of one person, and yet at the same time be the servant of another in relation to a particular matter, and it also shews that the important element, whereby to determine whether he is the servant of the one person or of the other in relation to the particular business on which he is engaged, is which of the two persons had the control of him in the conduct of that business.

The other case is *Donovan* v. *Laing, &c., Syndicate.* (2) There the defendants contracted to lend to a firm who were engaged in loading a ship at their wharf a crane with a man in charge of it. The man in charge of the crane received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers and was employed by them to direct the working of the crane, sustained an injury

(1) 2 C. P. D. 205. (2) [1893] 1 Q. B. 629.

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through being struck by it by reason of the negligence of the man in charge, and sued the defendants on the ground that the negligence was the act of their servant. It was held that though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. That case is on all fours with *Rourke* v. *White Moss Colliery Co.* (1) Now, apply the principle of those cases to the facts of the case before me. What control had the livery-stable keeper over the driver while driving the defendant's horse? Absolutely none. The whole control was in the defendant, who could have ordered the driver to go fast or slow, or stop or go on, just as he pleased, or to keep the horse without food, or otherwise manage the horse as he directed. Bowen L.J., in the course of his judgment in *Donovan* v. *Laing, &c., Syndicate* (2), indeed says (3): "The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: *Laugher* v. *Pointer* (4) and *Quarman* v. *Burnett* (5); but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage." But in so distinguishing the case with which he was dealing from the carriage cases, it is clear that he only intended to include under that latter term cases in which the stable-keeper is letting out a complete equipage, carriage, horses, and man, and did not intend to include under it such a case as the present.

The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him

(1) 2 C. P. D. 205.
(2) [1893] 1 Q. B. 629.
(3) [1893] 1 Q. B. at p. 634.
(4) 5 B. & C. 547.
(5) 6 M. & W. 499.

between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be altogether a different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver. And in such a case, especially if, as here, the driver has driven the hirer for a considerable period of time and been approved by him, and the horse is one the characteristics or peculiarities of which neither the livery-stable keeper nor his driver have had any practical opportunity of becoming acquainted with, there is, it seems to me, evidence upon which a jury would be justified in coming to the conclusion that the driver was upon the occasion in question acting as the servant, not of the livery-stable keeper, but of the person who hired him. I have come to that conclusion. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *J. H. Mote & Son.*
Solicitors for defendant: *P. J. Gordon & Son.*

J. F. C.

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July 8.

[IN THE COURT OF APPEAL.]

In re A DEBTOR.
Ex parte THE DEBTOR.

Bankruptcy—Married Woman—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 152—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

Judgment was obtained against a single woman on a bill of exchange. She then committed an act of bankruptcy, and the creditor presented a petition for adjudication against her. She promised to settle the demand, and prevailed on the registrar to adjourn the case till March 3. On March 2 she married. On March 24 the registrar made a receiving order. She was not carrying on a trade separately from her husband:—

Held, that on the construction of the Bankruptcy Act, 1883, and the Married Women's Property Act, 1882, as she was not carrying on a trade separately from her husband, she was not subject to the bankruptcy laws, and the receiving order must be discharged.

On December 4, 1897, a writ of summons was issued by the petitioning creditor against the debtor, then a spinster, on a bill of exchange accepted by her. On January 25, 1898, he obtained judgment against her for 201*l.* 4*s.* 4*d.* debt, and 11*l.* 5*s.* 10*d.* costs. On February 4, 1898, the judgment creditor presented a petition for adjudication in bankruptcy against the debtor, she having in the meantime committed an act of bankruptcy. On February 22, 1898, the petition came on to be heard, and was adjourned to March 3 on the application of the debtor, who promised to settle the demand. On March 2 the debtor married. On March 3 the petition was again adjourned, and ultimately on March 24 the registrar made a receiving order on the ground that the conduct of the debtor had precluded her from relying on the immunity of a married woman from the bankrupt law. The debtor appealed from this order.

F. Cooper Willis, for the appellant. A married woman, though possessed of separate estate, if not trading separately from her husband, is not subject to the bankruptcy laws: *In re*

Gardiner, Ex parte Coulson. (1) This is continuing the old law, as stated in *Ex parte Holland, In re Heneage.* (2) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 152, nothing in that Act is to affect the provisions of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). Sect. 1, sub-s. 5, of that Act provides that a married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws as if she were a feme sole. That excludes her from the bankruptcy laws in other cases.

[Collins L.J. referred to *Ex parte Jones, In re Grissell.* (3)]

The effect of making a receiving order would be that if the debtor did not make a proposal for composition—which she could not do—she would be adjudged bankrupt. It is not necessary to ask the Court to go a step further than it has gone in former cases; for the conclusion to which the Court is asked to come follows naturally from the previous decisions.

The petitioning creditor did not appear.

Lindley M.R. We are of opinion that, on the construction of the Married Women's Property Act, 1882, and the Bankruptcy Act, 1883, the order appealed against cannot be supported. The case is peculiar. This lady, the debtor, was sued while a single woman, and judgment was obtained. She committed an act of bankruptcy, and a petition in bankruptcy was presented against her. So far all was quite regular. When the petition came on for hearing she induced the registrar to let it stand over that she might settle the demand. On the day before the day to which it stood adjourned she married; and now she says that, as she is a married woman not carrying on a trade separately from her husband, she is not liable to any further bankruptcy proceedings. I think that the view of the law put forward on her behalf is the right one. The cases of *Ex parte Coulson* (1) and *Ex parte Jones* (3) shew that a married woman cannot be proceeded against in bankruptcy except in the case provided for by the Married Women's Property Act,

(1) (1887) 20 Q. B. D. 249. (2) (1874) L. R. 9 Ch. 307.
(3) (1879) 12 Ch. D. 484.

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1882, s. 1, sub-s. 5. The receiving order must therefore be discharged, but without costs.

CHITTY and COLLINS L.JJ. concurred.

Appeal allowed.

Solicitors: *Colyer & Colyer.*

H. C. J.

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May 24; *July* 2.

KENNAIRD *v.* CORY & SON.

River—Thames Navigation—By-law of Watermen's Company—Tug towing Barges—Waterman on Tug to assist in Management and Navigation—Ultra Vires—Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *ss.* 66, 80.

By s. 80 of the Watermen's and Lightermen's Amendment Act, 1859, power is given to the Court of the Watermen's Company to make by-laws for the government of the company, for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company.

By s. 66 of the Act, no barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandise is to be worked or navigated within the limits of the Act, unless there be in charge of such craft a licensed lighterman or qualified apprentice, under a penalty not exceeding 5*l.*

By by-law 60 of the Watermen's Company, made under the above Act, "Every steamboat navigated on the river within the limits of this Act in the towing of barges, lighters, vessels, or craft shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof, and if any such steamboat shall be navigated in contravention of this section (*sic*) the owner thereof, or the master in charge of the same, shall incur a penalty not exceeding 40*s.*" :—

Held, that the by-law was not a by-law made for carrying into effect the purposes of the Act, and was not authorized by the provisions of s. 66 of the Act, and that it was therefore ultra vires and bad.

CASE stated by the stipendiary magistrate for the borough of West Ham.

The respondents appeared to answer an information laid by the appellant charging that the steamboat *Rotifer*, of which the respondents were the owners, unlawfully towed the barge *Hetty* on the Thames off Silvertown without having a licensed water-

man on board such steamboat for the purpose of assisting in the management and navigation of the same, contrary to by-law 60 of the by-laws made under the Watermen's and Lightermen's Amendment Act, 1859. At the hearing the learned magistrate found as a fact that the steamboat *Rotifer* did on December 6, 1897, on the Thames off Silvertown, tow and navigate one barge without having on board such steamboat a licensed waterman to assist in the management and navigation thereof.

By-law 60 is as follows: "That every steamboat navigated on the river within the limits of this Act in the towing of barges, lighters, vessels or craft shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof, and if any such steamboat shall be navigated in contravention of this section the owner thereof, or the master in charge of the same, shall incur a penalty not exceeding 40*s*. And that every barge, lighter or craft towed on the river by steamboat shall have one licensed lighterman or licensed apprentice at the least in charge thereof to steer and navigate the same, and if the same shall be navigated in contravention of this section the owner thereof, or the person in charge of any such craft, shall incur a penalty not exceeding 40*s*."

It was contended by the respondents—

(1.) That the by-law was ultra vires and not within the scope of s. 80 of the Watermen's and Lightermen's Amendment Act, 1859, which is as follows: "The said court of master, wardens, and assistants are hereby empowered from time to time to make such by-laws as they think proper for the government of the said company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of this Act and the several powers and authorities hereby vested in the said company, with power to annex reasonable penalties and forfeitures for the breach of such by-laws respectively, not exceeding the sum of 5*l*. for any one offence, so that the same by-laws be not inconsistent with any of the laws of this kingdom, or with this Act, or with any of the by-laws, rules, orders, or regulations made or to be made by the Conservators

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of the River Thames under the authority of the Thames Conservancy Act, 1857, or of any Act for the time being in force relating to the conservancy of the River Thames; and also from time to time to alter, amend, and repeal such by-laws, or any of them: Provided always, that no such by-laws shall in any way interfere with the tolls of the Sunday ferries hereinbefore authorized, and that no such by-laws or alterations in by-laws shall be of any validity until they shall have been approved by the Conservators of the River Thames."

(2.) That the by-law was inconsistent with the Act, because in s. 66 of the Act, which provides that "No barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandise shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned, or an apprentice qualified as hereinbefore mentioned; and if any such craft be navigated in contravention of this section the owner thereof shall in respect of such offence incur a penalty not exceeding 5*l.*," there is the proviso that "No such penalty shall be payable if the owner proves, to the satisfaction of the magistrate or Court before whom the case is heard, that he is unable, for the usual compensation, to obtain the services of any such lighterman or apprentice"; while in by-law 60, which requires in some cases a waterman and in some cases a lighterman to be employed, there is no similar proviso.

(3.) That the by-law was unreasonable, especially on the ground that, although it purports to confer certain privileges on watermen, neither the said Act nor the by-laws impose any corresponding obligation on them to work on a steam-tug.

(4.) In the alternative it was further contended by the respondents that if the by-law was good no offence had been committed, as only one barge was being towed.

(5.) The learned magistrate dismissed the information on the ground that looking at the general scope of the Watermen's and Lightermen's Amendment Act, 1859, and the interpretation given by s. 3 of that Act to the word "waterman," by-law 60, so far as the information before him was concerned, was ultra vires.

The question for the opinion of the Court was whether the learned magistrate was right in holding by-law 60 to be ultra vires.

A. J. Ashton, for the appellant. The respondents should have been convicted upon the admitted facts in the case. The by-law is valid, and not ultra vires; it is within the power to make by-laws conferred by s. 80 of the Watermen's and Lightermen's Act, 1859, being made "for carrying into effect the purposes of the Act"; as to what are the purposes of the Act assistance may be derived from the preamble, as was done in *Powell* v. *Kempton Park Racecourse Co.* (1) It practically reproduces s. 66 of the Act, and is a good by-law for the regulation of persons employed to navigate on the River Thames, and for the security of passengers on boats in the river. In *Elmore* v. *Hunter* (2), which was under the same section and under the latter half of the same by-law, it was held that a man was required on each of six barges which were being towed by a tug; and if a man is required for the barge, he is equally required for the tug, which has the control of the navigation. The power of the Watermen's Company to compel the employment of an extra man to keep a look-out at the bows of a steamboat was recognised in *Gosling* v. *Green* (3), and it is equally reasonable that a by-law should prevent the possibility of there being only one man on the deck of the tug with no one to assist him. [He also cited *Edmonds* v. *Watermen's Co.* (4); *The Quickstep* (5); *Rolles* v. *Newell.* (6)]

C. A. Russell, Q.C. (*Theodore Howell*, with him), for the respondents. The by-law is bad. *Gosling* v. *Green* (3) is no authority to the contrary; that case only decided that the by-law was not inconsistent with a subsequent by-law of the Thames Conservancy; the point was not taken that it was not within the power to make by-laws conferred by the statute. It is not within the provisions of s. 66, which deals exclusively with the question of who shall be in charge of barges and

(1) [1897] 2 Q. B. 242.
(2) (1877) 3 C. P. D. 116.
(3) [1893] 1 Q. B. 109.
(4) (1855) 24 L. J. (M.C.) 124.
(5) (1890) 15 P. D. 196.
(6) (1890) 25 Q. B. D. 335.

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lighters under certain circumstances; it does not, at least in terms, deal with the question of persons in charge of tugs or steamboats.

Ashton, in reply.

Cur. adv. vult.

July 2. The written judgment of the Court (Wills and Kennedy JJ.) was delivered by

WILLS J. The decision of the learned magistrate is in our opinion correct.

We shall not attempt to define the office of a by-law or to lay down the limits of its operation. It is sufficient to say that by-laws of the class with which we are dealing derive their authority from the statute which gives power to make them, and the provisions of different statutes in that behalf vary almost infinitely; so that it is necessary in any particular instance to look to the enactment under the authority of which the by-law affects to be made, and to see whether or not it is within the statutory power.

The by-law with which we have to do is one made by the Court (duly empowered to make by-laws) of the Master, Wardens, and Commonalty of the Watermen and Lightermen of the River Thames, and s. 80 of their Act of 1859 (22 & 23 Vict. c. cxxxiii. Sess. 2) is the enactment upon which the power to make by-laws is founded. It provides that "the Court of Master, Wardens, and Assistants are hereby empowered to make such by-laws as they think proper for the government of the said company, and for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of this Act and the several powers and authorities hereby vested in the said company." The by-law in question is by-law 60. It provides "That every steamboat navigated on the river within the limits of this Act in the towing of barges, lighters, vessels, or craft shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof," and imposes a penalty of 40*s*. upon the owner or the master in charge of any steamboat

navigated in contravention of this "section"—i.e., of this by-law.

The word "vessel" in this by-law must be read as vessel of the like kind with barge or lighter. Nothing is clearer in the Act of 1859 than that the only craft it deals with (excepting passenger boats) are lighters, barges, and kindred craft, and that in the few places in which the word "vessel" has been introduced it refers to vessels of the like kind with lighters and barges, and not to vessels of all sorts; and it is fair, therefore, in favour of the by-law, to give the word the same meaning in the by-law; otherwise it would be preposterously beyond anything within the purview of the Act.

Now, the by-law is clearly not one for the government of the company, nor for the governing and regulation of lightermen or watermen; it can only be supported, therefore, if it aids in carrying into effect the purposes of the Act, or some one or more of the powers and authorities vested in the company by the Act. It is necessary, therefore, to see what these purposes, and what these powers and authorities, are. Part of the preamble of the Act recites that "it is expedient that proper regulations should be made for the navigation of barges, lighters, boats, and other like craft carrying goods, wares, and merchandise within the limits of this Act, and for the regulation of the persons employed to navigate the same, and for the security of passengers passing to and fro on the said river in boats and other craft, and for the orderly conduct of the traffic on the said river"; and it was argued broadly that all the matters referred to in this recital are amongst the purposes of the Act, and that the court had power to make the by-law in question, inasmuch as its object (it was said) fell under one or another of the above heads.

This argument, however, magnifies to the extent of distortion the proper office of a preamble. If it is sound, there is hardly a subject connected with the traffic on the river, whether for business or pleasure, goods or passengers, which might not be dealt with—from a cockboat to an ocean steamer—or the regulation of speed, manning, lights, and everything else which may be considered to bear upon the security of passengers in

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boats and craft or the orderly conduct of traffic. It does not follow that because large words are used in a preamble everything to which they can be referred is within the scope of the Act. They may be useful to a limited extent in helping to interpret doubtful passages or phrases in the Act, but they do not extend its provisions or its scope beyond what the enacting parts of the Act contain, and it is necessary, therefore, to see what the Act does provide for.

Sect. 2 defines a passenger boat as a "sailing boat, river steamboat, rowboat, wherry, or other like craft, used for carrying passengers within the limits of the Act, unless there is something in the context inconsistent with such a meaning." Sect. 3 defines a "lighterman" as any person working or navigating for hire a lighter, barge, boat, or other like craft within the limits of the Act, and "waterman" as "any person navigating, rowing, or working for hire "a passenger boat," unless there is something in the text inconsistent with such meanings." Sects. 6–42 refer to the internal affairs of the company. Sects. 43-45 (now repealed) require lighters and such-like craft to be registered, and certain particulars to be painted visibly on the craft. Sects. 46–52 regulate the apprentices and their indentures and rights, and s. 53 refers to the registration of persons who may enter into indentures with apprentices. Sect. 54 read shortly enacts that if any person, not being a freeman licensed in pursuance of this Act or a qualified apprentice, shall act as a waterman or lighterman, or ply or work or navigate any wherry, passenger boat, lighter, vessel, or other craft upon the river within the limits of this Act for hire or gain, he shall be liable to a penalty. Provided that any licensed lighterman or qualified apprentice may work as a lighterman. Sects. 55–60 regulate the qualifications of applicants for a lighterman's or waterman's licence and the fees payable in respect of them. Sect. 61 enacts that every apprentice may upon certain conditions become a freeman. Sects. 62–65 deal with matters connected with licences.

Sect. 66 has more bearing upon the matter in hand. It enacts that "no barge, lighter, boat, or other like craft for the

carrying of goods, wares, or merchandise shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned, or an apprentice qualified as hereinbefore mentioned," and imposes a penalty not exceeding 5*l.* for a breach of the section, unless the owner of the boat proves that he was unable for the usual compensation to obtain the services of a licensed lighterman or apprentice. Sect. 67 provides with regard to passenger boats that no unlicensed person shall row, steer, or navigate them for hire within the limits aforesaid under a like penalty. Sects. 68–79 contain various miscellaneous provisions having no bearing whatever upon the present question, and the same may be said of the rest of the Act (ss. 81–103) following s. 80, which gives the power to make by-laws.

It seems to us that there is no single provision or purpose of the Act which is subserved by the requirement that a steamboat towing barges shall have on board one licensed waterman to assist in the navigation and management thereof. The by-law provides not even for compulsory pilotage, but merely for compulsory employment. A person who is to assist in the management and navigation of the vessel must necessarily be under the orders of the captain or whoever represents the captain: he has no right to give an order or to take the helm, or to do anything but obey the captain's orders—a position for which any able-bodied man accustomed to a tug is just as competent as the waterman. It is a curious thing, and interesting as shewing how little the framers of these by-laws were thinking of anything tending to the convenience or safety of navigation, that the person who must be taken on board the tug is not even to be a lighterman, but a waterman, who according to the Act is a person having especially to do with passenger boats. The Act gives no special privileges of employment to watermen or lightermen, except to the extent provided for by s. 66 as to lightermen and by s. 67 as to watermen (including in both cases apprentices to the respective branches of the trade), and the by-law attempts to extend these privileges, and to force upon the owners of tug-boats members of the company to perform

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services for which, so far as the Act is concerned, the owners are at liberty to go into the open market.

Sect. 66 has been relied upon in a way which is not very easy to follow, but which seems to come practically to this—that the steamboat is concerned in the navigation of the lighters she tows, and that therefore there ought to be a licensed person in charge of her, and that the by-law enacts something less, and is therefore not objectionable. It is true that in a sense the tug is concerned in the navigation, but she is not a lighter or other craft for the carrying of goods, and there is nothing in the Act anywhere giving the court of the company a power to interfere with the owner or master of the tug in managing his steamboat as he may think fit. The framers of the by-laws have taken a very extravagant view of their powers of legislation, for they have not hesitated to enact in by-law 98 that if any person shall act as master, or in the command of, or assist in the management of any steam or sailing boat or vessel whose voyage shall commence or terminate within the limits of the Act, until licensed by the court in the way provided by the Act, he shall be liable to a penalty. According to this by-law, no person can use the waterway of the Thames, a highway from time immemorial, for any purpose, if it be begun or ended within the limits in question, whether of pleasure, trade, or business, without putting a licensed waterman or lighterman in command. I am not surprised that we were told that no attempt had been made to enforce the by-law. But it affords a key to a good deal that otherwise would be startling in the by-laws.

We have no doubt, therefore, that the by-law in question is radically bad. Were it even within the general scope of the powers to make by-laws, it would be in the highest degree unreasonable upon another ground. There is no exemption from the penalty, whatever be the circumstances under which the failure to take a waterman on board the tug occurs. There may be none available, or the one available may demand an exorbitant sum; the penalty attaches notwithstanding, and the saving provision which in the Act was made applicable to a case under s. 66, and exempted the owner, if the lighterman

could not be got for an ordinary wage, is wanting in the by-law. But our objection goes far deeper, and could not be removed by any mere modification of the by-law.

It only remains to say a word or two about two cases which were pressed upon us by the appellant's counsel, Mr. Ashton, in the course of a very ingenious argument. In *Elmore* v. *Hunter* (1) it was held that where six barges were being towed by a tug, and there were only four lightermen in charge, s. 66 of the Act was violated, for they were being "worked or navigated," notwithstanding that they were being towed. It is very difficult to see how any Court could possibly have come to any other conclusion. What we have stated is the decision, and the whole of it, and it seems to us to have no bearing whatever upon the validity of by-law 60, or any other that we know of. In *Rolles* v. *Newell* (2) a prosecution was instituted under by-law 59 of the Watermen's Company, which says that if any person, when in charge of and navigating any steamboat on the Thames, shall at the same time tow more than six barges exceeding ten tons each attached thereto, he shall incur a penalty. The person prosecuted had been in charge of a steamboat towing thirty-one such barges into a dock communicating with the Thames. The Court held that under the circumstances of the case, to which it is not necessary further to allude, he had not in so doing been navigating the river Thames, and quashed a conviction which had taken place. The decision certainly has not the slightest bearing upon the present question, but Lord Coleridge speaks of the by-law as in itself reasonable and useful. There had been no question raised as to its validity and no reference to the powers under which the by-law was made, and therefore there is no expression of judicial opinion that the by-law was within those powers. It is, perhaps, unnecessary to express any opinion upon that question. By-law 59 is clearly of a very different character from by-law 60. There is nothing on the face of it unreasonable, and it may be a useful regulation in the interests of public safety, which would be good enough if made by the authority of persons having power to legislate in that behalf. By-law 60, on the other hand, would seem to

(1) 3 C. P. D. 116. (2) 25 Q. B. D. 335.

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subserve no purpose except to find work or, at all events, pay for watermen. But we confess that, except in the very general words of the preamble, with which we have already dealt, we can find nothing in the Act from beginning to end to which by-law 59 can be considered as ancillary.

Judgment for respondents.

Solicitor for appellant: *Arthur C. Kent.*
Solicitors for respondents: *Sewell, Edwards & Nevill.*

W. J. B.

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Aug 10.

[IN THE COURT OF APPEAL.]

MARROW *v.* FLIMBY AND BROUGHTON MOOR COAL AND FIRE BRICK COMPANY, LIMITED.

Employers' Liability Act—"*Workman*"—*Person Employed in Coal Mine by Contractor*—*Liability of Mine-owner*—*Working* "*under a Contract with an Employer*"—*Coal Mines Regulation Act*, 1887 (50 & 51 *Vict.* c. 58)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict.* c. 90), s. 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict.* c. 42), s. 8.

By s. 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by s. 10 of the Act of 1875 a "workman" means "any person who, being a labourer, . . . miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer," whether the contract be express or implied.

By the special rules of a colliery made under s. 51 of the Coal Mines Regulation Act, 1887, the manager of the mine was made responsible for the control, management, and direction of the mine, and was to appoint such competent persons as might be necessary for carrying out the provisions of the Act, and all persons employed in or about the mine were to obey his directions; and the chargeman in each shift was to have charge of the sinking operations.

E. entered into a contract with the owners of the colliery to sink a shaft in their coal mine. By the contract E. (who was therein called the contractor) was to provide such sinkers, &c., as might be necessary for the execution of the work, and was to be paid a certain sum per fathom sunk. E. employed and paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him, and his

administratrix brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death :—

Held, that E. was an independent contractor; that the deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875; and that therefore the Employers' Liability Act, 1880, did not apply :

Held, also, that the control given by the Coal Mines Regulation Act, 1887, and by the special rules of the mine, to the manager over all persons in the mine, did not make E. and the sinkers employed by him "workmen" in the employment of the colliery owners within the meaning of s. 10 of the Act of 1875.

APPEAL from the judgment of a Divisional Court setting aside the verdict and judgment obtained for the plaintiff in the county court of Cumberland, and entering judgment for the defendants.

The plaintiff, the administratrix of her deceased husband, claimed damages under the Employers' Liability Act, 1880, and the Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act, for the death of her husband, who was killed while working in the defendants' colliery.

The defendants having, in November, 1896, invited tenders for the sinking of a shaft at their colliery, a pit-sinker named Evans sent in a tender for the work which was accepted. On November 16 a contract was accordingly entered into between the defendants and Evans, by which Evans (who was therein called the contractor) agreed to sink and wall the shaft on the following terms and conditions :—

"1. The shaft to have a clear finished diameter inside any brickwork of twelve feet, and the bricks to be set in mortar and to be nine inches or six inches thick, as may be required by the company's manager. Curbs to be put in of such size and at such intervals as may be required by the manager, and to be correctly plumbed, levelled, and securely jointed, and to be thoroughly well wedged all round. 2. The shaft to be sunk and finished quite vertical. Any deviation from this to be made good by the contractor at his own expense; and in case he refuses, neglects, or fails from any cause to so remedy such defect, the company to do the work and to deduct the cost from any moneys which they may hold in hand belonging to the

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contractor. 3. The contractor to provide such sinkers, banksmen, &c., as may be necessary for the diligent execution of the work, and to tip and fill all metal, coal, and stones, &c., dug out of the sinking into pit-tubs and deliver at the siding, the company to provide assistance for this work. To clean all coal and good stone, and send it separately, and to find all explosives, fuses, and open lights when used, and fix all water-pipes and air-pipes to the orders and satisfaction of the manager. 4. The contractor to fill all water and bank any water which may be met with up to a quantity of 400 gallons per hour, and to clear the shaft of all water that may accumulate during week-ends or between shifts. 5. The contractor to carry on the work continuously and rigorously during the following specified hours in each week until the work is completed" (then followed the hours specified), "and to have not less than one chargeman and five others employed at the pit-bottom on each shift; and if the progress of the work be hindered or stopped by any fault or neglect of the contractor or his workmen, the company shall have power to impose a fine of 5*s*. for each shift hindered. 6. All the work shall be done in a workmanlike manner to the satisfaction of the manager, and the contractor shall supply the company with a true section of the strata sunk through. 7. The company to provide engine-men and tools, and to sharpen all tools; and the contractor to be held responsible for all tools, &c., handed into his charge, to be paid for if lost or damaged, fair wear and tear excepted. All bricks, blocks, rings, mortar, and material necessary for carrying on the work to be provided by the company at a spot convenient for the work. 8. Payments on account of work done to be made fortnightly, and to be based upon the work done (for which purpose measurements shall be taken) less 10 per cent., which shall be retained by the company until the work is completed, and also less any moneys which may be due to the company for explosives, fuse candles, or stores supplied to the contractor. The company also reserve the right to retain, in addition to the 10 per cent., any sum which may be earned in any pay in excess of what will pay fair wages, such reserve money to be used to equalize the wages in sinking

through such ground where fair wages cannot be earned. Should the contractor leave the work previous to the completion of this contract, or neglect or unsatisfactorily carry on the work, the company to have power to terminate this contract without notice, and the contractor to forfeit all moneys owing, and the company may make good all unsatisfactory work at the contractor's expense. 9. The kind and quality of explosives and the method of firing to be at the absolute discretion of the manager. 10. The contractor to properly fix the travelling landing-stage and trolly at the commencement of each period of work, and to remove the same and leave the landing pit-eye clear and in a proper condition to immediately commence coal-winding with both cages at the termination of each period of work. The contractor and his men must be clear of the shaft by 5.30 A.M. each morning. 11. For carrying out the work to all the conditions herein specified the company agree to pay the sum of twelve guineas (12*l.* 12*s.*) per fathom vertically sunk, walled, and completed to the contractor."

The deceased man was employed by Evans on the work as a sinker, his wages being 5*s.* a day, paid by Evans. The shaft which was being sunk was at the bottom of an old shaft, and, in order to protect the men while at work in sinking it, a movable platform was placed at the top. This platform having become unsteady, the banksman, named Relph, who was employed and paid by Evans, put in a piece of wood, called a chock, to support it, and this chock fell down the shaft and struck the deceased man on the head and killed him. At the time of the accident Evans, who was working with the deceased in the shaft, was acting as "chargeman."

The action was brought under s. 1, sub-ss. 1, 2, 3, of the Employers' Liability Act, 1880. (1) At the conclusion of the case it was submitted on behalf of the defendants that there was no evidence to go to the jury that the deceased man was a workman in the employment of the defendants within the

(1) There was also a claim for law liability for negligence, but no damages founded upon the common question arose as to this.

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meaning of the Employers' Liability Act, 1880 (1), and that the plaintiff could not recover. The county court judge ruled that there was evidence to go to the jury upon this point, and in

(1) 43 & 44 Vict. c. 42, s. 8: "The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

The Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 10: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract . . . . be express or implied, oral or in writing, and be a contract of service, or a contract personally to execute any work or labour."

Special rules were made for the mine under s. 51 of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58). By rule 2 the manager "shall be responsible for the control, management, and direction of the mine, and shall himself, or by an under-manager where appointed, exercise daily personal supervision of the mine; and shall comply with the requirements and, to the best of his power, enforce the observance of the Act and of the special rules, and shall appoint such competent persons as may be necessary for carrying out the provisions of the Act."

Rule 51: "Each deputy shall have the responsible charge of the portion of the mine assigned to him, and shall . . . . enforce the observance of the general and special rules. . . . ."

Rule 68: "Each deputy shall, to the best of his ability, enforce the observance of the Act and special rules, and shall have power to suspend anyone infringing or attempting to infringe the same, and to order him out of the mine, and shall report the case to the overman or other official in charge of the mine."

By rule 101 the banksman was to have control of the shaft-top, and was not to allow any person to descend or ascend the pit without permission from the proper authority, and was to regulate the order in which persons should enter and leave the cage, and see that the authorized number only descended or ascended at one time.

Rule 116: "All persons who are casually employed underground (masons, enginewrights, and others) shall be amenable to the Act and the special rules, and shall make themselves acquainted with the same."

By rule 124 all persons employed in or about the mine, both above and below, were to obey the directions of the manager; and by rule 166, in addition to general rule 36, every workperson was, in the performance of his work, to obey such directions as he might receive from the under-manager or deputy, or any other officer, with a view to safety, or to the convenience and discipline of the mine.

Rules 174–177 dealt with the duties of the banksman; and by rule 178, "the chargeman in each shift shall have full charge of the sinking operations, and shall once in every shift, or oftener if necessary, examine the sides of the shaft, and take off any loose stones, and if anything is faulty or unsafe, stop sinking until it is made secure. . . . ."

the result the jury found a verdict for the plaintiff for 234*l.*, and the judge gave judgment for that amount. The Divisional Court (Wills and Kennedy JJ.) held that there was no evidence that the deceased was a workman in the employment of the defendants within the meaning of the Employers' Liability Act, 1880, and entered judgment for the defendants.

The plaintiff appealed.

Ruegg, Q.C., and *Henry*, for the plaintiff. The only question upon this appeal is whether there was any evidence to go to the jury that the deceased man was a "workman" in the employment of the defendants within s. 1 of the Employers' Liability Act, 1880. By s. 8 of that Act "workman" is defined as meaning a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. By s. 10 of this latter Act "workman" is defined as meaning any person who, being a labourer, miner, or otherwise engaged in manual labour, has entered into or works under a contract, express or implied, oral or in writing, with an employer. Evans, the contractor, was a "workman" within that definition. He was engaged in manual labour, and he acted as chargeman. The contract between him and the defendants gave the defendants such control over him that he was not an independent contractor, but a workman in the employment of the defendants. In *Brown* v. *Butterley Coal Co.* (1) it was held that persons employed by and working under a butty-man in a mine were under the control of the mine-owner, so as to make them workmen in the employment of the mine-owner, within the Employers' Liability Act, 1880. A similar decision was arrived at in the Scottish case of *Morrison* v. *Baird & Co.* (2) *Levering* v. *St. Katharine's Dock Co.* (3) and *Ruth* v. *Surrey Commercial Dock Co.* (4) are also cases in which the Court held that, though the work was done through a contractor, there was evidence from the control reserved to the defendants that the men employed by the contractor were the servants of the defendants. Further, the nature of the control which the manager and others exercise

(1) (1885) 53 L. T. 964.
(2) (1882) 10 Rettie, 271.
(3) (1887) 3 Times L. R. 607.
(4) (1891) 8 Times L. R. 116.

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by virtue of the provisions of the Coal Mines Regulation Act, 1887, over all persons employed in a coal mine creates the relationship of employer and workman between the colliery owner and the persons so employed in the mine, whether they are engaged by an independent contractor or not. There can be no such thing in a coal mine as an independent contractor employing servants who are not the servants of the colliery owner. This shaft which was being sunk comes within the meaning of the word "mine," which by s. 75 of the Coal Mines Regulation Act, 1887, includes every shaft in the course of being sunk. Sect. 20 gives the manager full control over the mine. Sect. 49 sets out the general rules applicable to all mines, which rules give the owner, agent, or manager full control over all persons in the mine. Therefore Evans himself became a servant of the defendants, and the servants he engaged became also servants of the defendants. Again, the special rules made under s. 51 of the Act, which have the force of a statute, make this still more clear. Chargemen and banksmen are persons necessary for carrying out the provisions of the Act within the meaning of rule 2, and by that rule they must be appointed by the manager; and rule 116 makes all persons who are casually employed underground amenable to the Act and the special rules. By rule 178 the chargeman in each shift is to have full charge of the sinking operations. Evans was chargeman, and therefore he must be taken as having been appointed chargeman by and under the control of the manager of the mine. He therefore became the servant of the defendants, and not an independent contractor, and was in a position similar to that of the butty-man in *Brown* v. *Butterley Coal Co.* (1), and the alleged independent contractor in *Morrison* v. *Baird & Co.* (2) There was, therefore, evidence in this case that both Evans and the men employed by him, including the deceased man, were workmen who had entered into or were working under a contract with the defendants as employers within the meaning of s. 10 of the Employers and Workmen Act, 1875, and the verdict and judgment for the plaintiff in the county court ought to be restored.

(1) 53 L. T. 964. (2) 10 Rettie, 271.

F. A. Greer, for the defendants. The definition of a "workman" in s. 10 of the Employers and Workmen Act, 1875, applies to persons who enter into a contract, express or implied, with an employer to serve him. In this case Evans did not enter into any contract with an "employer." He made an independent contract with the defendants to do certain work for them for a fixed sum, and he engaged and paid the men employed by him. The contract with Evans made him an independent contractor, and the fact that Evans was a working man cannot alter the nature of the contract. The deceased man did not enter into any contract with the defendants, nor did he work under any contract with them as his employers within the meaning of s. 10. Under the Employers' Liability Act, 1880, there must, according to the definition of workman given therein, be a contract of employment before the relation of employer and workman can arise. As regards the contention that there cannot exist in a mine the relation of independent contractor and mine-owner, s. 8, sub-s. 2; s. 11, sub-s. 2; and s. 22, of the Act of 1887, expressly recognise the existence of an independent contractor in a mine. With respect to the control exercised under the Act of 1887 and the special rules over persons working in a mine, that control cannot alter the contractual relationship between the parties. The control is given to the manager and other persons to enable the mine to be safely worked. In *Brown* v. *Butterley Coal Co.* (1) the Court held on the facts that there was evidence that the deceased man was a workman in the employment of the defendants; and in *Morrison* v. *Baird & Co.* (2) the only question was whether the pleadings shewed any cause of action, and the Court held that they did, and that the case must be tried. In *Rourke* v. *White Moss Colliery Co.* (3) the Court recognised the position of an independent contractor in a coal mine. The deceased man was not, therefore, in the employment of the defendants.

Ruegg, Q.C., replied.

Cur. adv. vult.

(1) 53 L. T. 964. (2) 10 Rettie, 271.

(3) (1877) 2 C. P. D. 205.

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Aug. 10. A. L. SMITH L.J. read the following judgment:—The question in this appeal is whether there was any evidence to go to the jury that the plaintiff's husband was a workman in the employment of the defendants within the meaning of the Employers' Liability Act, 1880, when he met with the injury which caused his death. The jury, under the direction of the learned county court judge, have found for the plaintiff, with damages 234*l.*; but my brothers Wills and Kennedy have set that verdict aside, and have held that there was no evidence to support it; and the plaintiff now appeals.

This action was brought by the plaintiff, as administratrix of her late husband, in the county court under the Employers' Liability Act, 1880, coupled with Lord Campbell's Act, to recover damages for the death of her husband. There was added to the plaint a claim founded upon common law negligence. The learned county court judge informs us that this claim was not abandoned, and whatever rights the plaintiff may have at common law are left untouched by this judgment, and she is to be at liberty to proceed at common law, if so advised.

It may be taken as a fact that the plaintiff has given evidence of all the requirements necessary to support an action for damages by a workman against his employer under the Employers' Liability Act with this one exception: it is said, and the Queen's Bench Division has held, that she has given no evidence that her deceased husband was at the time of the accident a workman in the employment of the defendants, and, what is more, that the facts of the case shew that he was not such a workman at the time of the accident.

By the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which is an Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service, it is enacted by s. 8 that "the expression 'workman' means . . . . any person to whom the Employers and Workmen Act, 1875, applies"; and by s. 10 of that Act (38 & 39 Vict. c. 90) "the expression 'workman' . . . . means any person who, being a labourer, ... miner, or otherwise engaged in manual labour, ... has entered into or works

under a contract with an employer, whether the contract .... be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." It seems to me that the words "or works under a contract with an employer" were inserted into the section to meet the case of a workman who has not contracted directly with an employer, but has been engaged by an agent of the employer to work for the employer—videlicet, by a butty-man or a ganger, or to meet the case of an apprentice or other similar cases.

Now the facts are these. In the month of November, 1896, the defendants were desirous of sinking a shaft at their colliery, and they invited tenders for this work, and upon the 16th of that month they entered into a contract in writing with a man named Evans, who had tendered for the work, and who was what is called a pit-sinker by trade. By this contract Evans undertook to sink a shaft at the defendants' colliery. He was, as therein is provided, in certain instances to execute some of the works under the orders and supervision of the manager of the mine. By this contract Evans (who throughout is designated as "the contractor") was to provide such sinkers, banksmen, &c., as might be necessary, and he undertook to have not less than one chargeman and five others employed at the pit bottom on each shift. Evans had to pay the wages of the men he employed, and the defendants had to pay Evans for the shaft as it progressed the sum of 12*l.* 12*s.* per fathom sunk. Evans, after paying the wages of the men he employed upon this work, and after paying for the other matters which he had contracted to supply, made his profit over the job out of what remained of the 12*l.* 12*s.* per fathom after making the payments above mentioned. The deceased man was employed by Evans upon this job as a sinker, and was paid by Evans the sum of 5*s.* per diem for so working. In these circumstances the question is whether there is any evidence that the deceased man was a workman in the employment of the defendants when he met with the accident as he did whilst working as above stated at 5*s.* per diem for Evans. I do not go through the written contract between Evans and the

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defendants clause by clause, for this has already been done by my brother Kennedy. All I would add is that the word "wages" used in clause 8 in no way appears to me to shew that Evans was not a contractor with the defendants, as the written contract throughout shews that he was, for this word refers to the wages of the men employed by Evans and not to Evans's wages, as it was argued, for he, as I have said, had to look to his profit, and not to wages for his remuneration. I have not the slightest doubt that this contract between Evans and the defendants is a contractor's contract; in other words, that under it Evans contracted as a contractor to sink the shaft for the defendants, and it is to me clear that the deceased man was the workman of the contractor, Evans, who employed him, and not the workman of the defendants, who in fact never employed him, nor was he employed by Evans on the defendants' behalf. I would ask upon the above facts, whom could the deceased man have sued for his wages, Evans or the defendants? There can be but one answer—namely, Evans, and not the defendants, for the simple reason that he was a workman in the employment of Evans, and not of the defendants. It is clear to me that, unless there be evidence ultra this written contract to shew that the deceased man was a workman in the employment of the defendants, the learned county court judge, upon proof of this written contract, ought to have directed judgment for the defendants, for, unless the plaintiff gave evidence that her deceased husband was the workman of the defendants at the time of the accident, her action under the Employers' Liability Act obviously fails. Now what evidence is there outside this contract that Evans engaged the deceased man for and on behalf of the defendants so as to constitute him a "workman who has entered into or works under a contract with" the defendants as his employers? In my judgment there is no pretence for saying that Evans was in the position of a butty-man or ganger, who is not ordinarily a contractor, and I have not therefore to discuss such a case, nor the case of *Brown* v. *Butterley Coal Co.* (1), nor the Scottish case of *Morrison* v. *Baird* (2), referred to therein,

(1) 53 L. T. 964.

(2) 10 Rettie, 271.

in which it was averred in the pleadings that the contractor was authorized to engage men for the colliery.

But it was argued for the plaintiff that the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), coupled with the rules in the Act and the special rules which were applicable to the defendants' mine for the conduct and guidance of persons acting in the management of the mine, afforded evidence of the relationship of workman and employer, and not that of contractor and principal, between Evans and the defendants, and there was thus evidence of the relationship of workman and employer between the deceased man and the defendants. It was argued thus: It was said that by s. 75 of the Coal Mines Regulation Act, 1887, as also by the special rules, the word "mine" included every shaft in the course of being sunk; that the certificated manager, by rule 2 of the special rules, had to appoint such competent persons as might be necessary for carrying out the provisions of the Act; that by rule 174 and the following rules as regards sinkers there must be a chargeman in each shift who should have full charge of the sinking operations; that Evans filled this post of chargeman over the sinkers, and therefore it was said that Evans was thus placed under the control of the defendants when acting as chargeman. Suppose this to be so—and as regards the duties of chargeman which Evans had to perform I think it was so—how is this material unless the control of the defendants over Evans be such as to alter the contractual relation between Evans and them from that of contractor and principal to that of workman and employer? Of this, in my judgment, the Act and rules do not afford a scintilla of evidence. The statutory control given by the statute and rules over persons in the mine does not in any way alter the relationship of the contracting parties inter se; they simply give control to the mine-owner over persons in the mine so as to enforce the prescribed regulations for carrying on without danger the mining operations. It was at one time suggested in argument for the plaintiff that, by reason of the Coal Mines Regulation Act and rules, there could not exist in a mine the relation of contractor and mine-owner, for every one therein was contemplated by the Act and rules to be in

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the position of workman towards the mine-owner; but Mr. Greer, in his excellent argument, very soon pointed out that this was not so, and he referred to sections in the Act, and especially to s. 8, sub-s. 2, which shew that this point is untenable. A suggestion was made that there was evidence to go to the jury in support of the plaintiff's case, because it was said that the defendants had discharged a man named Relph, who was the man who caused the accident, and, as Relph was employed by Evans in the same way as the deceased man was, this was evidence that the deceased man was the workman of the defendants. But the facts fail the plaintiff here, for when Relph's evidence is read it shews that Evans, whom he calls his employer, dismissed him, and not the defendants. As there was no evidence, so far as the contract of November 16, 1896, is concerned, of the deceased man being a workman in the employment of the defendants when he met with the accident, and as there was no evidence dehors the contract of his having been so, in my judgment there was no evidence to go to the jury in support of the plaintiff's case, and I think that my brothers Wills and Kennedy came to a correct conclusion, and that this appeal must be dismissed with costs.

RIGBY L.J. read the following judgment:—The only point that we are in a position to decide on this appeal is whether or not there was evidence to go to the jury that the relation of employer and workman existed between Marrow, the man who was unfortunately killed by the falling of the chock, and the defendant company, so as to give the county court jurisdiction under the Employers' Liability Act, 1880. There was indeed a claim based on the common law liability of the defendants; but that claim cannot now be dealt with. It would depend upon considerations entirely foreign to those which must guide our decision under the Employers' Liability Act, 1880; among others, whether the defendants were not liable for the negligence of the banksman or under a statutory duty, which could not be evaded by making a contract with Evans or any other person, to take proper precautions to prevent such an accident as unhappily took place, and whether they did not fail in such

duty. We have nothing to do with such points here, and our decision can have no effect as to them.

The question that we have to decide must in the first place depend upon the construction of the Act of 1880, and therefore on that of the Employers and Workmen Act, 1875. Under the Act of 1880 the expression "workman" is defined (s. 8) as meaning "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." Was then the deceased a person to whom the Act of 1875 would apply? That, of course, takes us to the definition clause contained in s. 10 of the Act of 1875, which, so far as is material, runs as follows: "The expression 'workman' . . . . means any person who, being a labourer . . . . or otherwise engaged in manual labour . . . . has entered into or works under a contract with an employer, whether the contract . . . . be express or implied." In dealing with the words of the section, we must bear in mind (*a*) that the definition is exhaustive; (*b*) that the definition is very general in its application to different kinds of trades, and is by no means confined to workmen working in mines; (*c*) that it contains no reference to control exercised by one person over another, so that it certainly does not affect to include cases in which a person not an employer may by reason of control exercised over a person not his workman become liable for injury caused by the negligence of the latter. Control of itself may in proper cases be evidence of a contract, but cannot otherwise be of importance in construing the definition.

Going now to the precise words, I assume, as in my judgment I ought on the facts of this case to assume, that Marrow would fall within the description of workman if either he had entered into a contract, express or implied, with the defendant company as employers, or, not having entered into such a contract, he was working under such a contract. Of the first alternative there seems to me to be no trace of evidence. The words "contract express or implied" are very wide, and would, in my judgment, include all cases of men engaged by any agent for that purpose of the employer, and men known by the employer or his agent to be working and allowed to go on working in

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expectation of wages from the employer. But here the contract, and the only contract, express or implied, into which Marrow had entered was a contract with Evans to do manual labour as a sinker at the wages payable by Evans of 5*s.* a day. Under this contract he was engaged, paid, and liable to be dismissed by Evans, and, if the work upon which he was engaged had not been work in a mine—had been, for instance, the work of a mason employed by Evans to assist in building a house which Evans was under a contract to build—there would, I think, have been no possibility of holding that he was under the control of the defendant company, even if that fact would have brought him within the Act.

There remains only the alternative that Marrow, not having entered into a contract, express or implied, with the defendant company, as employers, was yet, within the meaning of the definition, working under such a contract. In this case the only contract with the defendant company under which he could possibly be suggested to have been working was the contract made by Evans. I do not care to discuss the question whether that contract was a contract with an employer. If it was not, Marrow clearly could not be a workman to whom the definition applied. If Evans's contract was a contract with an employer, within the meaning of the definition, the question still remains whether Marrow was working under it. Now, what is meant by saying that a man is working under a contract which he has not entered into? There is one obvious instance of such working under a contract, namely, that of a volunteer who, without communication with the employer of labour, gives his services either to supplement or replace the workmen actually employed. Between such a volunteer and the employer questions have not infrequently arisen strictly analogous to those between the actually employed workman and the employer which ought naturally to be referred to the same tribunal. The case of the volunteer would fully account for the throwing-in of the words "works under." For myself, I find it difficult to understand how any wider construction can be given to those words without including cases which no one has ever suggested should be brought within

them. But there may be cases which have not occurred to me, and I therefore do not decide that volunteers only are aimed at.

The question here is whether a workman works under a contract where the actual party to the contract has employed him without reference to or by the authority of the other contracting party. If that were so, every dispute between a person for whom a builder has contracted to build a house, or a shipbuilder a ship, and the masons, shipwrights, and other workmen employed by the builder or shipbuilder, would fall within the Act. I do not think that a construction which would lead to such a result can be the true construction of the Act of 1875.

But it was argued that the case of coal mines is an exceptional case, and that by reason of the Coal Mines Regulation Act, 1887, and the special rules regulating this colliery and having the force of statutory rules, the operation of the Employers' Liability Act, 1880, is extended to all men working in the mine, either because all persons working in a mine must be deemed to be in the employment of the mine-owner, or for some other reason. But the Act of 1887 itself, as was pointed out by Mr. Greer, during his very able argument, expressly recognises that there may be employers of labour in a mine other than the owner, agent, or manager (see s. 8, sub-s. 2; s. 11, sub-s. 2; s. 22). After this it seems to be impossible to contend successfully that every person working in a mine is necessarily in the employment of the mine-owner. The special rules in force for the regulation of the colliery remain to be considered. Not only miners, but all persons who may happen to be casually employed, such as masons, enginewrights, and others, are (special rule 116) amenable to these rules and bound to make themselves acquainted with them, and no doubt Marrow, as a sinker, would come within this rule. Undoubtedly for the purposes of the rules the manager, under-manager, and other agents of the mine-owners have important duties imposed upon them, and considerable power of control over all persons in the mine. This may be of great importance with reference to the liability outside the Employers' Liability Act, 1880, of

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the mine-owners to a person injured in the mine; but I can find nothing in the rules to lead to the conclusion that the rules have any operation in the way of bringing about relations of a contractual nature between the mine-owners and the persons working in the mine, or that they in any way bear upon the question whether the mine-owners are, within the meaning of the Act, employers in such a case as the present or not.

Prior decisions are of little use in a case of this kind since, when once we get outside the construction of a written agreement, the question becomes one of fact in each case. The principal authorities relied upon by the appellant are the Scottish case of *Morrison* v. *Baird & Co.* (1) and the English case of *Brown* v. *Butterley Coal Co.* (2) The other cases referred to of *Levering* v. *St. Katharine's Dock Co.* (3) and *Ruth* v. *Surrey Commercial Dock Co.* (4) seem to me of no use whatever, since they do not shew what the contracts were under which the work was being done. The Scottish case (1) turns out upon examination to be a decision not upon the facts, for the issue directed never was brought to trial, but upon a question of pleading as to the admissibility of an issue whether the deceased, while employed as a workman in the service of the defenders, was through the fault of the defenders struck by a mass of rock and thereby sustained injuries of which he died: see p. 281 of the report. This question depended upon another, namely, whether the pursuer had made averments which, if proved, would make out a case under the Employers' Liability Act, 1880. Her averments are set out at p. 272 of the report, and obviously raise totally different questions from any arising here. I need only refer to the statement that the defenders authorized the middlemen (who were in a position somewhat similar to that of butty-men in some collieries in England) to employ drawers, of whom the deceased was one. If it were shewn in fact that the deceased was employed by the authority of the defenders, they would be his employers. The case of *Brown* v. *Butterley Coal Co.* (2) cannot give any real assistance

(1) 10 Rettie, 271.
(2) 53 L. T. 964.
(3) 3 Times L. R. 607.
(4) 8 Times L. R. 116.

owing to the very imperfect description given of the position of "butty-men" in the colliery. We cannot take judicial notice of what a butty-man is, and I dare say the position may be very different in different collieries. It may well be that the Court in that case adopted the view of the facts put forth in the argument by counsel for the plaintiff, namely, "Mines are worked on the butty system merely as a means of employing the men and regulating the payment of wages, and butty-men are not really sub-contractors." If so, the conclusion arrived at would be correct, but, at the same time, inapplicable to the facts of this case. It would not either be safe to lose sight of the circumstance, of which we are reminded by Wills J. in his judgment in the present case, that among the special rules applicable to the Butterley Colliery there was one, rule 38, which provided as follows: "Every workman is engaged subject to these rules, and shall observe the same and abide by the consequences of neglecting them, and his commencing to work shall be considered as an agreement equally binding on the owner and himself," &c. This made all the special rules part of a contract between the mine-owners and every workman working in the mine—an element entirely wanting here. On the whole, I do not think that there are among the decisions relied upon on the part of the appellant any which can fairly be said to be applicable to the state of facts found in the present case. The oral evidence at the trial seems to me to be entirely outside the question except so far as it shews that Evans was the real employer of Marrow.

Such evidence of control as there is, including the suggested dismissal of the banksman, is fully accounted for by the statutory rules, and cannot, therefore, be evidence of a contract between Marrow and the defendant company as employers.

I very much regret, as to its operation in the present case, the conclusion at which I have felt bound to arrive, since it seems to me that it depends, not on the real merits of the case, but only on the technical though important question of the applicability of the Employers' Liability Act, 1880. I agree that our judgment must be expressed to be without prejudice to the question of the plaintiff's rights under the claim at

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common law on which, if she is so advised, she is to be entitled to proceed as advised.

VAUGHAN WILLIAMS L.J. read the following judgment:—I agree that this appeal should be dismissed, and I doubt whether I can add anything worth adding to the judgments of my learned brothers; but perhaps it is better to express my views in my own language.

The plaintiff cannot succeed in so much of this action as is brought under the Employers' Liability Act, 1880, unless she shews that her deceased husband was a "workman" within the meaning of that Act; and I think that it is clear that the deceased was not at the time of the accident a workman within the meaning of that word in the Employers' Liability Act of 1880. For the purpose of this action the definition contained in s. 10 of the Employers and Workmen Act, 1875, is the definition upon which the question of the jurisdiction of the county court under the Act of 1880 to entertain this action must depend, since the question is whether the deceased was a workman within the meaning of that part of the definition in the Act of 1880 which consists of the incorporation therein of the definition in the Act of 1875. Now, s. 10 of the Act of 1875 runs thus: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract . . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Now, had the deceased entered into a contract with the defendants, as employers, express or implied, oral or in writing, or was he working under such a contract? He clearly did not enter into a written contract with the defendants; he clearly did enter into an oral contract with Evans. Evans was his employer, and I think that there was no contract between the deceased and the defendants, express or implied, oral or in

writing. I do not mean to say by this that a man engaged in one job cannot possibly, in that job, have different masters as regards different parts of the work necessary for the completion of the job. Sometimes, as appears by the facts set forth in the report of *Union Steamship Co.* v. *Claridge* (1), the employer of the contractor employed in a particular job retains control over the servants engaged in a particular part of that job. In the case mentioned the steamship company, although contracting with a stevedore to discharge the cargo, retained control over the winchmen and bullrope men, members of the crew, who worked so much of the ship's tackle as was used in carrying out the discharge of the cargo contracted to be done by the stevedore. In such a case it might well be that the servants of the steamship company might, in working the ship's tackle for the purpose of the completion of the job contracted to be done by the stevedore, have to avail themselves of the services of the stevedore's men, who for this purpose would be lent by the stevedore to the shipowners. So in the present case it seems to me that the chargemen and banksmen paid by Evans might nevertheless, in so far as they performed those duties which by statute or rules are placed under the supervision of the colliery proprietors, be the servants of the colliery proprietors even though they were engaged and paid by Evans; and the same thing would be true of the deceased if he was working for the furtherance of that part of the work, the supervision of which was by statute imposed upon the colliery proprietors, and which supervision the colliery proprietors could not delegate.

I do not think that there is any such work in the present case; but if the deceased had had, as part of his duty, to assist the banksman or deputy in carrying out his statutory work under the supervision of the colliery proprietors, I think that, quâ this part of the work, the deceased and the banksman would have had a common master in the colliery proprietors. But it by no means follows that the colliery proprietors would be employers and the deceased their workman even as regards this part of the work. But I am by no means sure that, where

(1) [1894] A. C. 185.

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any one assumes the control of work and workmen, and the workman accepts such employment, there is not an implied contract for employment and service with an implied obligation of reasonable care on either side. Indeed, if Rigby L.J. is right in thinking that the words "under a contract" in s. 10 of the Act of 1875 point to the employment of volunteers, it would seem that an implied contract for service such as that which I have suggested ought to be held to arise and bring the case within the definition. It is not, however, necessary to decide this in the present case. For myself, I think those words were intended to cover the case of apprentices and butty-men who contract as representing the men.

Appeal dismissed.

Solicitors for plaintiff: *Wood & Wootton, for T. Milburn, Workington.*

Solicitor for defendants: *A. Toovey, for Lightfoot & Lightfoot, Maryport.*

E. L.

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[IN THE COURT OF APPEAL.]

R. H. BUCKLEY & SONS, LIMITED *v.* N. BUCKLEY & SONS.

Water—Artificial Watercourse—Alteration of Natural State of Things—Sluice-gate—Obligation of Owner to Repair—Easement—Right to take Water granted to Owner of adjoining Land—Damage by Flood.

Where the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he erected, made a watercourse with a shuttle at the head of it to control the flow of the water from the river into the watercourse, and afterwards conveyed away a portion of his land adjoining, and his successor in title subsequently granted to the owner of the adjoining land so conveyed a right to use the water for the purposes of a mill belonging to him:—

Held, that the existence of that right did not affect the obligation of the owner of the watercourse towards the owner of the adjoining land to keep the shuttle in repair so as to prevent flood water from the river getting into the watercourse and overflowing on to his land.

Pomfret v. *Ricroft*, (1669) 1 Wms. Saund. 321, discussed.

APPEAL from the judgment of Bruce J. at the trial of an action before him without a jury.

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R. H. Buckley & Sons, Limited v. N. Buckley & Sons.

The action was for negligently and improperly permitting the sluice-gate or shuttle at the head of a goit belonging to the defendants to be out of repair, and not managing, regulating, and controlling the same and the said goit, by reason whereof large quantities of water flowed into the goit and from thence on to the plaintiffs' land, and did damage to goods stored thereon.

It appeared that the plaintiffs were the owners of a cotton mill and premises situated on the bank of the river Tame in Yorkshire, called Wood End Mill, and the defendants were the owners of a cotton mill and premises adjacent to the plaintiffs' called Carr Hill Mill. The land which formed the sites of both the plaintiffs' and the defendants' premises had originally belonged to one Cresswell. In 1803 Cresswell erected the Carr Hill Mill. He also made a weir on the river and constructed the goit in question on his land for the purpose of bringing water from the river to that mill. This goit had a sluice-gate or shuttle at the head of it to control and regulate the flow of water from the river into the goit. The water was used by the owners of the Carr Hill Mill for the purpose of turning a wheel until 1867; but in that year the wheel was removed, steam-power being substituted, and the water since then had been used by them for condensing purposes.

In 1812 Cresswell conveyed to predecessors in title of the plaintiffs in fee the site on which the Wood End Mill was afterwards erected; but the weir and the goit, the upper part of which ran through the land so conveyed, were expressly excepted from the conveyance and reserved together with full right to enter upon the land conveyed for the purpose of repairing them. In 1815 Cresswell's successors in title conveyed to Nathaniel Buckley, a predecessor in title of the defendants, in fee, among other hereditaments, the Carr Hill Mill with the weir and goit in question. Nathaniel Buckley devised this property to John Buckley, who devised it to David Hyde Buckley. In 1870 David Hyde Buckley conveyed it in fee to Nathaniel Buckley, a descendant of the previously mentioned person of that name. For some years prior to the deed next after mentioned the owners of the Wood End Mill

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had been using the water in the goit for condensing purposes. By deed dated December 29, 1874, and made between the last-mentioned Nathaniel Buckley and Robert Shaw Buckley, a predecessor in title of the plaintiffs, to whom the Wood End Mill then belonged, in consideration of a money payment, Nathaniel Buckley granted to Robert Shaw Buckley the right, privilege, or easement, to build bridges and other erections over such part of the goit as was coextensive with his land, and both parties mutually covenanted that they would not respectively do or suffer to be done any act or thing whatsoever whereby the free and uninterrupted stream or running of water through, over, and along the said goit should or might be interfered with or obstructed. Since the execution of the last-mentioned deed the owners of the Wood End Mill had continued to make use of the water in the goit for condensing purposes. By deed dated November 22, 1876, Nathaniel Buckley mortgaged to certain persons, among other hereditaments, the Carr Hill Mill with the goit. (1) In 1890 the property included in the mortgage of 1876 was conveyed by the trustees of Nathaniel Buckley's will and the mortgagees to the defendants in fee.

It appeared that, the shuttle at the head of the goit having been allowed to get out of repair, by reason of such want of repair a flood in the river Tame had in 1895 carried it away, and the flood water rushing into the goit had overflowed its banks where it passed through the plaintiffs' land and flooded the plaintiffs' premises, thereby causing the damage complained of. The learned judge gave judgment for the plaintiffs for 150*l*., the amount of damages agreed upon by the parties.

Joseph Walton, *Q.C.*, and *E. Sutton*, for the defendants. The argument for the plaintiffs will be that, the defendants' predecessor in title having altered the natural state of things by constructing this weir and goit, and the water having been

(1) One of the questions raised was whether this deed included the portion of the goit passing through the plaintiffs' land. The Court held that it did. The facts and arguments as to this point are not given, as it did not involve any question of legal principle.

brought thereby upon the defendants' land for their benefit, the doctrine of *Rylands* v. *Fletcher* (1) applies, and the defendants were bound at their peril to control the flow of the water so as to prevent its damaging the lands of neighbouring owners, including the plaintiffs. But the doctrine of *Rylands* v. *Fletcher* (1) depends on the fact that the defendant in that case conducted the water to the place from whence it got into the plaintiff's premises for his own purposes only. The doctrine does not apply to a case where the water is brought on to the defendant's land for the joint benefit of the plaintiff and the defendant: see per Bramwell B. in *Carstairs* v. *Taylor* (2); see also *Ross* v. *Fedden* (3); *Gill* v. *Edouin*. (4) In this case the goit existed for the joint benefit of the plaintiffs and the defendants. The plaintiffs' predecessor in title, when he acquired the right to use the water in the goit whether by prescription or under the deed of 1874, must be taken to have assented to the existence of the goit and the bringing of the water on to the land. After the execution of the deed of 1874 the owners of defendants' lands had no right to restore the natural state of things and prevent the flow of water down the goit. Therefore the doctrine of *Rylands* v. *Fletcher* (1), according to which the person who brings water on to his land insures the owners of neighbouring lands against its escape, and is liable for damage caused thereby independently of negligence, does not apply. The defendants were not guilty of negligence in not repairing the shuttle, for they were under no obligation to the plaintiffs to repair it. The plaintiffs having an equal right to the use of the water in this goit were entitled to repair the shuttle themselves, and it was for them to do so. Not having done so, they cannot throw the consequences on the defendants. It is settled law that the owner of the dominant, and not the owner of the servient tenement, must do the repairs necessary in connection with an easement: *Pomfret* v. *Ricroft* (5); Gale on Easements, 6th ed. p. 465.

(1) (1868) L. R. 3 H. L. 330.
(2) (1871) L. R. 6 Ex. 217.
(3) (1872) L. R. 7 Q. B. 661.
(4) (1895) 71 L. T. 762.
(5) 1 Wms. Saund. 321.

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There was no breach of duty by the defendants, because there was no duty on their part towards the plaintiffs to repair the shuttle.

Pickford, Q.C., and *Bradbury*, for the plaintiffs. The defendants' predecessors in title, prior to the acquirement of the easement of using the water in the goit by the plaintiffs' predecessor in title, were, on the principle laid down in *Rylands* v. *Fletcher* (1), clearly bound to keep the shuttle in repair to prevent damage to the lands of neighbouring proprietors, the goit having been made and the water brought by them on to their land for their benefit. The grant to the plaintiffs' predecessor of the right to use the water in the goit could not affect that duty. In the cases relied on by the defendants the reservoir, or other apparatus containing the water, was made originally for the benefit of both parties. Where a landowner makes a reservoir of water on his land for his own purposes originally, his obligation to take care that the water does not escape so as to damage a neighbouring proprietor cannot be divested because he grants to that proprietor a right to take water from the reservoir for some purpose. When Cresswell conveyed the plaintiffs' land to their predecessors in title, reserving the goit, his position was just the same as if he had made an artificial watercourse through his own land, the land on either side thereof belonging to the plaintiffs' predecessors. *Pomfret* v. *Ricroft* (2) does not shew that the plaintiffs could have repaired this shuttle on the defendants' land. At the utmost it only shews that the owner of the dominant tenement can do such repairs as are necessary for the enjoyment of the easement. As long as the owner of the dominant tenement is in the enjoyment of the easement, he cannot go on to the land of the owner of the servient tenement and alter his property in order to make his own property safer. Assuming that the plaintiffs had the right, if they had chosen, to repair the shuttle, that does not do away with the obligation of the defendants to repair it.

E. Sutton, in reply.

(1) L. R. 3 H. L. 330.

(2) 1 Wms. Saund. 321.

A. L. Smith L.J. The defendants, being at the time when the damage was done the owners of the goit and shuttle, which had been originally constructed by their predecessor in title for the purposes of his mill, were primâ facie bound not to allow them to get into a dangerous state, but to keep the shuttle in repair, so as to prevent damage being done to the owners of adjoining land by water coming down the goit. It is however argued that, assuming that to be so, they are nevertheless not liable in respect of the damage occasioned to the plaintiffs, because the grant made in 1874 by their predecessor in title to the plaintiffs' predecessor in title of a right to the flow of the water in the goit did away with the duty towards the plaintiffs to repair the shuttle that would otherwise be imposed upon them; and, further, that the damage was caused by the plaintiffs' own fault, because they did not themselves repair the shuttle as they might have done. I cannot see that the right granted by the deed of 1874 did away with the obligation that previously lay on the owners of the defendants' land to repair the shuttle. Assuming that the owners of the plaintiffs' land after that deed had the power to repair the shuttle in order to regulate the flow of water for the purpose of the enjoyment of the easement granted to them, I do not see how this could affect the obligation of the defendants to keep the shuttle in repair for the purpose of preventing damage to the plaintiffs' land. For these reasons I think the appeal should be dismissed.

Rigby L.J. I agree. When the defendants' predecessor in title, Cresswell, conveyed to the plaintiffs' predecessors in title the property now belonging to the plaintiffs, he became liable to his grantees to prevent the goit which he had made for his own purposes on land which continued to belong to him from becoming a source of danger to them. I see no reason to doubt, therefore, that he then became subject to an obligation towards them for that purpose to keep the shuttle in repair. The question is whether anything has since happened to affect the obligation so imposed upon the owners of the defendants' premises. I will assume that either by the deed of 1874 or by prescription the owners of the plaintiffs' premises acquired a

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right to use the water flowing in the goit for certain purposes, and that that right carries with it the incidental right to repair the shuttle on the defendants' land. I do not however think that, because the plaintiffs might have repaired the shuttle, it follows that the defendants are therefore relieved from the primary obligation which lay upon them as owners of the goit originally constructed by their predecessor for his own purposes to keep the shuttle in repair, so as to prevent damage to the plaintiffs arising from the existence of the goit.

Vaughan Williams L.J. I am of the same opinion. I entirely dissent from the suggestion that the doctrine of *Pomfret* v. *Ricroft* (1) negatives the liability of the defendants to the plaintiffs in this action. There can be no doubt that down to 1874, when the plaintiffs' predecessor in title acquired a right to the continuance of the flow of water in the goit, the defendants' predecessors in title, who had made and maintained an opening in the bank of the river and an artificial watercourse leading therefrom for their own purposes, were under an obligation to the owners of adjoining land, including the owners of the plaintiffs' land, to take care that the water so conducted along their watercourse did not break loose and do damage to those owners. It is suggested however that, the plaintiffs having acquired a right to the flow of water in the goit, the doctrine of *Pomfret* v. *Ricroft* (1) applies, and the beforementioned obligation of the owners of the defendants' land towards the owners of the plaintiffs' land has therefore ceased. It may be taken that the decision in that case establishes that the owner of the servient tenement is under no obligation to the owner of the dominant tenement to execute such repairs as may be necessary for the enjoyment of the easement, and that the owner of the dominant tenement cannot sue the owner of the servient tenement for not doing such repairs. But I do not see how that doctrine in any way gets rid of the obligation, which was imposed on the owners of the land on which this artificial watercourse had been constructed long before the plaintiffs' right to use the water came into existence, to keep

(1) 1 Wms. Saund. 321.

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the goit in repair so that the water should not break out and injure the lands of adjoining proprietors including those of the plaintiffs. I do not think that the plaintiffs' predecessor in title, by taking the right given him by the deed of 1874, and the consequential right of executing such repairs as might be necessary to enable him to get the benefit of that right, did away with the obligation imposed on the owner of the defendants' land to keep the shuttle in repair.

Appeal dismissed.

Solicitors for plaintiffs: *Emmett & Co., for J. H. Fletcher, Ashton-under-Lyne.*

Solicitors for defendants: *Cunliffes & Davenport, for T. Lawton, Manchester.*

E. L.

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Aug. 4, 5, 8.

Criminal Law—Jurisdiction—Fugitive Offender—Committal to await Return—Power to admit to Bail—Fugitive Offenders Act, 1881 (44 & 45 *Vict.* c. 69).

Where a magistrate has made an order, under the Fugitive Offenders Act, 1881, committing to prison a person accused of having committed an offence, to which Part I. of the Act applies, in some part of Her Majesty's dominions, or within the jurisdiction of a Consular Court, to await his return to the place where the offence is alleged to have been committed, the Queen's Bench Division of the High Court has jurisdiction to admit the accused to bail until the time for his return.

Application for a writ of habeas corpus to release the defendant from custody, or for an order to admit the defendant to bail, and to vary the order for the return of the defendant by directing that he be returned for trial to Gibraltar instead of to Tangier.

The defendant had been arrested under the Fugitive Offenders Act, 1881 (1), on a warrant charging him with

(1) 44 & 45 Vict. c. 69. By s. 2, "Where a person accused of having committed an offence, to which this part" (Part I.) "of this Act applies, in one part of Her Majesty's dominions has left that part, such person

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unlawful and riotous assembly on a steamer within the territorial waters of the Empire of Morocco, and with riotously

(in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive. . . ."

By s. 5, "A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be (including the power to remand and admit to bail), as if the fugitive were charged with an offence committed within his jurisdiction.

If the indorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part" (Part I.) "of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State. . . . Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus, or other like process. . . ."

By s. 6, "Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of habeas corpus or other like process is issued with reference to such fugitive by a Superior Court, after the final decision of the Court in the case, if the fugitive is so committed in the United Kingdom, a Secretary of State . . . . may, if he thinks it just, by warrant under his hand, order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof. . . ."

Sect. 7 provides for the discharge of persons apprehended if not returned within one month.

Sect. 8 provides for the sending back of persons apprehended and returned, if not prosecuted within six months, or if acquitted.

By s. 9, "This part" (Part I.) "of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment . . . ."

Sect. 10 empowers a Superior Court to discharge a fugitive when the case

making an assault on certain soldiers of the Sultan of Morocco, by firing on the Sultan's ship, and participating in an assault on the boats of the ship manned by the Sultan's soldiers.

An order was made by a metropolitan police magistrate committing the defendant to prison to await his return to Tangier for trial.

The defendant obtained an order nisi for a writ of habeas corpus, or for bail, and to vary the order of the magistrate as above mentioned.

Aug. 4, 5. *The Attorney-General* (*Sir Richard Webster, Q.C.*) and *H. Sutton* (*Bodkin* with them), for the Crown, shewed cause. There is jurisdiction, under the Fugitive Offenders Act, 1881, and the Morocco Order in Council, 1889, to order that the defendant be returned for trial to Tangier, and if there is a strong or probable presumption that the defendant committed

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is frivolous or the return would be unjust.

By s. 35, "Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a Superior Court, and also if such person is in the United Kingdom a Secretary of State, ... if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part I. of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly."

By s. 36, "It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions, and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application."

By the Morocco Order in Council, 1889, published in the *London Gazette* for 1889, vol. ii. part 2, p. 7163, the Fugitive Offenders Act, 1881, applies to Morocco (clause 33, ta p. 7167).

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the offence mentioned in the warrant, within the meaning of s. 5 of the Act, the order for his return ought to stand. The evidence given before the magistrate proves that the defendant fired upon the ship and boats of the Sultan of Morocco from the steamer *Tourmaline*. This amounts to a riot, as defined in Hawkins's Pleas of the Crown, Book I. cap. 65, sec. 1, and such an offence is punishable by imprisonment with hard labour for twelve months or more, and therefore, by s. 9, the Fugitive Offenders Act, 1881, applies, and clause 24 (2) of the Morocco Order in Council, 1889, expressly refers to riot. As to the question of bail, it lies upon the defendant to shew that there is jurisdiction in this Court to allow bail, and there is nothing in the Act of Parliament, or the Order in Council, to confer any such jurisdiction. By s. 5 of the Act a fugitive has a right to apply for a writ of habeas corpus; but it is difficult to see how he could make the application if he were already out on bail. A further difficulty would arise in the case of a man who declined to surrender to his bail; to estreat his recognizances would not carry out the intention of the Act. Where it is intended that bail shall be allowed, it is expressly so specified, as in ss. 5 and 10, and this shews that bail is not to be allowed in other cases. Even if the power exists, no case for bail is made out. There is no ground for ordering a return to Gibraltar instead of to Tangier.

Cohen, Q.C. (*C. W. Mathews* and *Ellis J. Griffith* with him), for the defendant, in support of the order nisi. The evidence before the magistrate was not sufficient to justify a committal. No sufficient "strong or probable presumption" was raised, within the meaning of s. 5 of the Act, that the defendant committed the offence mentioned in the warrant. This Court has power, by the common law, to admit to bail, and there is nothing in the statute to take away that power. It is erroneous to say that the burden of proof is upon the party applying for bail. The present case is one in which bail ought to be allowed. If the defendant is to be returned, he should be returned to Gibraltar rather than to Tangier. There is power, by s. 35 of the Act, to make an order to that effect, and the defendant's uncontradicted affidavit states that he would be in

danger at Tangier, and that there is no sufficient police force there to protect him.

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Cur. adv. vult.

Aug. 8. LORD RUSSELL of KILLOWEN C.J. The defendant in this case is charged "for that he, being a British subject, did, on or about January 13, 1898, on the Sus coast, within the territorial waters of the Empire of Morocco, in the steamship *Tourmaline*, with others to the number of three or more, unlawfully and riotously assemble, and riotously make an assault upon certain soldiers of the Sultan of Morocco, by firing on the Sultan's ship named *Hassanie*, and participating in an assault on the boats belonging thereto, and at the time manned by such soldiers."

This is a charge of riotous assault in Morocco, where, under an Order in Council of 1889, Her Majesty has jurisdiction, and therefore, by s. 36 of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), that Act applies as if the place where the offence is alleged to have been committed were a British possession, and the defendant is subject to the jurisdiction conferred by s. 2. Therefore the alleged offence is one which justifies the order for the return of the defendant to Tangier, which has been made by the magistrate. The application made by the defendant for a habeas corpus is based on several grounds. Two objections were taken to the depositions on which the order was granted, but I think the evidence before the magistrate shews that neither of those objections ought to prevail. Thirdly—and this is the main point relied upon in support of the application for a habeas corpus—it is contended that the facts proved before the magistrate raise no strong or probable presumption that the defendant committed the offence mentioned in the warrant, within the meaning of s. 5 of the Fugitive Offenders Act, 1881. [His Lordship here made a summary reference to the leading points in the evidence.] It seems to me not to be necessary, or desirable in the interest of the defendant, to elaborate the matter much at this stage of the proceedings, but, on considering the whole of the materials which were before the magistrate, I am of opinion that there

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was sufficient evidence to warrant the magistrate in arriving at the conclusion that there was a strong or probable presumption that the defendant had committed the offence charged. For these reasons I am of opinion that the application for a habeas corpus ought to be refused.

Now arises a question of some difficulty. Failing the application to set aside the order for the return of the defendant, he asks that he may be admitted to bail until the time when he is to be returned. So far as I know this is the first occasion on which this question has arisen for decision. It is necessary to consider first how the question is to be viewed. Was Mr. Sutton right in saying that the defendant was bound to shew that power is given to admit to bail under the Fugitive Offenders Act, 1881, or, in other words, is the onus of shewing that the power to admit to bail exists cast on the defendant? I think not. This Court has, independently of statute, by the common law, jurisdiction to admit to bail. Therefore the case ought to be looked at in this way: does the Act of Parliament, either expressly or by necessary implication, deprive the Court of that power? The law relating to this subject is well stated in 1 Chitty's Criminal Law, 2nd ed. p. 97, as follows: "The Court of King's Bench, or any judge thereof in vacation, not being restrained or affected by the statute 3 Edw. 1, c. 15 (1) in the plenitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt, or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes, horse-stealing, libels, and for all felonies and offences whatever." I now proceed to examine the question whether in the present case the Fugitive Offenders Act, 1881, excludes or circumscribes the power of this Court to admit prisoners to bail. It is not suggested that it does so by express words. The question then arises whether it does so by implication. If it does, a curious result would follow,

(1) Repealed by 50 & 51 Vict. c. 55, s. 39.

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for it is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him; it is also conceded, that when the defendant is returned to the place to which his return is demanded, the tribunal having jurisdiction in that place can admit him to bail pending the result of the trial; and, this being so, it would be a strange result if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return. Therefore, forming the best judgment I can, I am of opinion that this Court has the power to admit a defendant to bail in such a case as the present. Mr. Sutton put this point: supposing a defendant, being committed by the magistrate, is admitted to bail by this Court, how is he to apply for a habeas corpus, seeing that he is already at large? I think there is really nothing in the point. He could apply for a habeas corpus before he was released on bail; but the language of s. 5 of the Act is conclusive. That section provides that "where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of habeas corpus, or other like process." These concluding words shew that, if the fugitive is committed to prison, he may apply for a writ of habeas corpus, or other like process, on grounds which go to the validity of the order for his return, and he would have the same right to apply if he were released on bail. Another point was taken, which raises a little more difficulty. It was suggested that if a man were admitted to bail, and he went away and declined to surrender, there would be no remedy except by estreating the recognizances, which would not have the effect of carrying out the intention of the Act; but in such a case it cannot be denied that the proceedings might be commenced de novo, and a fresh warrant issued, on which the accused could be arrested; this might no doubt cause delay, but the difficulty would not be insuperable. For these reasons, having carefully considered the different sections of the Act, and admitting that some difficulty might possibly

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arise in working out the procedure, I have come to the conclusion that the provisions of the statute are consistent with the recognition of the power of this Court to admit to bail in such cases as the present. This inherent power to admit to bail is historical, and has long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment. But how ought the power to be exercised? Considering the class of cases which are likely to arise under the Fugitive Offenders Act, it is obvious that the power ought to be exercised with extreme care and caution. Then a further question arises, which raises a further difficulty. It is suggested that, the charge in the present case being a charge of misdemeanour, if the power to admit to bail exists at all, the defendant would have an absolute right to bail. Were it so the contention would have some force; but on further consideration the difficulty seems to disappear, for the stage which the present case has now reached is not like a committal by a magistrate to sessions or assizes; it is an intermediate stage, something like the case where a warrant issued in one part of the kingdom is backed in order that it may be executed in another part. The defendant in the present case has not been committed for trial. The inquiry must begin in the place to which he is returned. Therefore we are dealing with an intermediate stage in the proceedings. Looking at the matter from that point of view, we find that it is not the usual practice for this Court to admit persons charged with misdemeanours to bail during remand in ordinary cases arising in this country. This view is supported by the following statement in Short and Mellor's Crown Office Practice, p. 374, after referring to 11 & 12 Vict. c. 42, s. 21: "This section gives a discretion to justices as to bail, during the preliminary inquiry. With this discretion the judges usually decline to interfere, and it is indeed said that it is absolute, and cannot be reviewed; but this assertion is somewhat difficult to reconcile with the assumption of law, based probably on Magna Charta, and enacted in the Habeas Corpus Act, 31 Car. 2, c. 2, that persons charged with any crime, unless treason or felony, are

entitled to bail as a matter of right on finding sufficient sureties. Doubts, however, have been entertained as to whether this power of the Queen's Bench applies to persons under remand, two learned judges having held that it does; but in a case where a judge had refused to bail at chambers a defendant under remand for misdemeanour, the Court on appeal decided that a defendant under remand on a charge of misdemeanour had no right to bail under 11 & 12 Vict. c. 42 until committal"; and the cases are referred to. Taking into account all the circumstances of the present case, ought we to admit the defendant to bail? Not without some doubt, I have come to the conclusion that we ought not. Looking to all the circumstances, and bearing in mind that it rests largely with the defendant himself how long he is detained before he is sent abroad, and that, when he is sent abroad, he can apply there to be admitted to bail, for the reasons already given we think that we ought not to exercise in the present case the jurisdiction to admit the defendant to bail, which we hold that we possess. It seems to me that, by the terms of s. 6 of the Fugitive Offenders Act, 1881, after the final decision of this Court on the present application, it is within the power of the Secretary of State straightway to order that the defendant be returned, and if the defendant wishes this to be done, and applies, no doubt it will be done.

The only remaining point is this. Failing the application for a habeas corpus, we are asked to order that the defendant be sent for trial to Gibraltar, instead of to Tangier. We have undoubted power to adopt this course, and, if we see reasons which in our opinion make it desirable to do so, it becomes our duty, and we are bound, to give effect to those reasons. That we have the power is clear, for it is conferred by the express words of s. 35 of the Fugitive Offenders Act, 1881. Then by the Morocco Order in Council, 1889, Part III., clause 11, "For better effectuating the provisions of this Order concerning the power and authority of the Supreme Court of Gibraltar in communication with the Court for Morocco, the Supreme Court . . . . shall, in all criminal matters in which the defendant is a British subject, ...

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have an original jurisdiction concurrent with the jurisdiction of the Court for Morocco. . . . Any jurisdiction exercisable by the Supreme Court under this article, or otherwise under this Order, may be exercised by any judge of that Court at Gibraltar, or at any place within the limits of this Order." (1) The question to be determined is, whether, for reasons which ought to operate judicially, the defendant ought to be returned to Gibraltar rather than to Tangier. The affidavit of the defendant is not contradicted. He states that his life has been threatened, and he goes on to say that there is no organised police force in Tangier: that is a statement which could be contradicted if it were untrue. What then is there that can be urged on the other side? It is said that there would be a difficulty in getting witnesses to attend; but the distance from Tangier to Gibraltar is not great, and, though it is true that our Courts cannot compel the attendance of the witnesses, it is to be observed that this prosecution is undertaken in the interest of the Sultan of Morocco, which makes it probable that means will be taken to secure their attendance, so that there can be little doubt that the necessary witnesses are likely to be available. Another reason for changing the place of trial is, that no jury can be summoned in Tangier. The Attorney-General cannot give any undertaking that the defendant will be tried by a jury at Gibraltar; but I think there are no circumstances which point to the impracticability or improbability of getting a jury at Gibraltar.

The result is, that the application for a habeas corpus fails, that in our opinion the power to admit to bail exists, but its exercise is discretionary, and we think that in this case it ought not to be exercised, but the order for the return of the defendant will be varied by directing that he be returned to Gibraltar instead of to Tangier.

WRIGHT J. I am of the same opinion, and for the same reasons, but I wish to add this observation, that cases arising under the Fugitive Offenders Act will not in all instances apply as precedents in cases under the Extradition Acts.

(1) *London Gazette*, 1889, vol. ii. part 2, p. 7165.

Under the Fugitive Offenders Act it is generally a question between different parts of Her Majesty's dominions, but under the Extradition Acts the jurisdiction depends in all cases on treaties with foreign countries.

KENNEDY J. I concur in the judgment which has been delivered by my Lord, but as to one portion of the case I have entertained considerable doubt. Looking at some of the questions which may arise as to procedure in the working of the Act, I have come only with considerable hesitation to the conclusion that we have power to admit to bail; but I entirely concur in the view that the burden of proof lies upon the party who asserts that the ancient and important jurisdiction of this Court to admit to bail is taken away by the statute.

Applications for habeas corpus, and to admit to bail, refused.
Order for return varied.

Solicitor for the prosecution: *The Treasury Solicitor.*

Solicitors for the defendant: *Hollams, Sons, Coward & Hawksley.*

P. B. H.

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July 23;
Aug. 11.

[IN THE COMMERCIAL COURT.]

SHELBOURNE & CO. *v.* LAW INVESTMENT AND INSURANCE CORPORATION, LIMITED.

Insurance, Marine—Policy—Construction—Collision—Loss by Detention during Repairs—Damages—Remoteness.

Barges were insured against loss or damage, which the insured should sustain, or become liable to others for, by reason of the collision of the barges with any other vessel. The barges having been damaged by collision, the insured claimed damages for loss in consequence of detention of the barges during repairs :—

Held, that, in order to be recoverable, the loss must be proximately caused by the perils insured against, and that the damages claimed were too remote, and could not be recovered under the policy.

TRIAL of an action in the Commercial Court before Kennedy J.

The action was brought by the plaintiffs on a "river insurance policy," and they claimed, first, for damage sustained by two barges by collision, and, secondly, 3*l.* in respect of one of the barges, and 4*l.* in respect of the other, for "loss in consequence of detention during repairs at 1*l.* per day." The defendants admitted the damage to the barges, and paid into court; they disputed their liability to the rest of the plaintiffs' claim, but did not contest the amount if the plaintiffs should be held entitled to recover.

The following were the provisions of the policy material to the point in question :—

Clause 1: "If during this insurance the insured shall sustain or become liable to others for loss or damage by reason of the collision of any vessel of the insured named in the schedule indorsed hereon with any other vessel, or with any buoy, mooring, bridge, stage, pier, or wharf, or any other similar structure, while such vessel of the insured is on the waters of the rivers Thames or Medway . . . . the corporation shall, subject as herein mentioned, pay or make good to the insured

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such loss or damage, and indemnify him against such liability," to the extent specified.

Clause 2: "Provided also that this policy shall not extend to nor cover . . . . (*d*) loss or damage which the insured may sustain or be liable to others for . . . . in respect of the cargo or engagements of the insured's vessel."

Clause 7: "The corporation may make good the loss or damage, instead of paying the amount thereof."

July 23. *Scrutton*, for the plaintiffs. The only question is, whether, on the true construction of this policy, the plaintiffs are entitled to recover 3*l*. in respect of one barge, and 4*l*. in respect of another, being at the rate of 1*l*. per day, for loss in consequence of detention during repairs. The words of clause 1 of the policy are sufficient to include this claim, and there is nothing in clause 2 (*d*) or clause 7 to limit the defendants' liability. It has been held by the House of Lords, in a collision case, that damages in respect of the loss of the earnings which the injured vessel would have derived from the completion of a contract which her owners had entered into were not too remote, but could be recovered: *The Argentino*. (1) In the present case, if the plaintiffs are entitled to recover, the amount is not disputed. The damages claimed are the ordinary and natural result of the injury to the barges by collision.

Lancelot Sanderson, for the defendants. Under this policy, in case of injury by collision, the insurers are liable to pay only the amount of the damage to the barges, and not these damages, which are not caused approximately by the perils insured against. Clause 2 (*d*) limits the liability of the defendants, and clause 7 shews that the terms of the policy are not applicable to this claim. *Menzies* v. *North British Insurance Co.* (2), which was a claim on a fire policy, supports the defendants' contention. *The Argentino* (1) is altogether a different case, being a claim by one shipowner against another for damages by collision. The decision of the Court of Appeal in *Pink* v.

(1) (1889) 14 App. Cas. 519. (2) (1847) 9 D. 694.

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Fleming (1) shews conclusively that in cases of marine insurance only the proximate cause of the loss can be regarded.

Scrutton replied.

Cur. adv. vult.

Aug. 11. KENNEDY J. The only question to be determined in this case arises on the claim indorsed on the writ for loss in respect of expenses incurred during the period when the barges were under repair. The two items of the claim are "Loss in consequence of detention during repairs" in respect of one of the barges three days at 1*l.* per day, and in respect of the other four days at 1*l.* per day, and the question is whether this sum of 7*l.* is recoverable. Both these claims are in addition to claims for damage to the same barges. The policy is a policy of river insurance. Two of the plaintiffs' barges were damaged by collision, and the plaintiffs contend that the claim in respect of loss in consequence of detention is covered by the policy. The defendants dispute their liability in respect of loss arising from detention, and the question is whether that part of the plaintiffs' claim can be recovered. This form of policy has not come before me until now, and, so far as I am aware, this is the first time that any question has arisen on such a policy. The whole matter turns on what is the true construction of the policy. It is dated December 12, 1897, and is a time policy for a year, so that it would expire on December 11, 1898. The barges insured are named in the schedule indorsed on the policy, which also states their tonnage and value. Then there is a further clause, providing that the insurers may make good any damage which may be done, instead of paying the amount to the insured. It looks as if this policy were constructed on the basis of an ordinary marine policy, with a running-down clause inserted, but there is one exception to the similarity, which is, that this policy covers collision with buoys, moorings, bridges, stages, piers, or wharves, or other similar structures.

The question for decision arises in this way. The plaintiffs contend that the policy, inasmuch as it professes to protect the

(1) (1890) 25 Q. B. D. 396.

insured, and to indemnify them in respect of loss or damage by collision, must include, not merely damage to their own barges, but also an indemnity for consequential loss beyond the cost of the repairs, that is, compensation for the barges being kept idle while undergoing repair, and for the wages and maintenance of the crews. The defendants, on the other hand, contend that this is not so, but that this is like an ordinary marine policy, and is an indemnity from the perils insured against, and, according to the well-known principles of marine insurance, no allowance for time is recoverable. It is urged that the loss is not proximately caused by the perils insured against, and that, even if it were, by the express words of clause 2 (*d*), the insurers are protected from liability to this claim. There can be no question that on an ordinary marine policy there would be no right to claim for loss of time, or for the wages and maintenance of the crew. No doubt the terms of the policy might be more clearly expressed, but, putting the best construction I can upon it as it stands, I am of opinion that the defendants' contention is well founded, and that the meaning of the policy, apart from clause 2 (*d*), is the same as that of an ordinary marine policy, namely, that the loss must be proximately caused by perils insured against. Mr. Sanderson contends that this loss is not proximate to the injury by collision, but is a fact which exists in consequence of the injury, but not directly caused by it, that it is a consequence rather of the repairs than of the injury by collision. It is said for the plaintiffs, and I think rightly, that the damages which the insured would be liable to pay to the owner of another ship that was injured by collision would include expenses caused by detention, either in respect of a special engagement of the ship, as in the case of *The Argentino* (1), or generally; but damages paid to the owner of another ship injured by collision are one thing, and damage sustained by the insured ship is another, and I think the latter means injury to the ship itself.

The view which I take is confirmed to some extent by clause 7, entitling the insurers to make good any damage, instead of paying the insured, for that can have no reference to

(1) 14 App. Cas. 519.

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the question of indemnifying owners of other vessels, but must necessarily refer only to loss or damage occasioned to the barges insured by the policy. I hold that the claim for damage for loss of time while the barges were detained for repairs, and for the wages and maintenance of the crews, is not payable to the plaintiffs by the underwriters under this policy.

Judgment for the defendants.

Solicitors for plaintiffs: *Farlow & Jackson.*

Solicitors for defendants: *Sharpe, Parker, Pritchards & Barham.*

P. B. H.

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May 17, 24.

THE ASSESSMENT COMMITTEE OF THE BRADFORD-ON-AVON UNION, APPELLANTS; WHITE, RESPONDENT.

Poor-rate—Assessment—Rateable Value—Licensed House—Competition of Brewers—"Tied" Houses—6 & 7 Will. 4, c. 96, s. 1.

In assessing a licensed public-house to the poor-rate, the fact that there is a great competition amongst brewers in the district to obtain the tenancy of such houses in order to sub-let them as "tied" houses ought not to be excluded from consideration so far as it shews the existence of such a demand as would necessarily increase the rent at which the premises might reasonably be expected to let, whether to brewers or others, on a tenancy from year to year; but the gross estimated rental ought not to be fixed at the special sum, in excess of the annual value obtainable in the market, which a brewer might be willing to give on the consideration, personal to himself, that he could make large profits by sub-letting the house as a "tied" house.

CASE stated by the Court of Quarter Sessions for the county of Wilts.

1. The appellant White was rated to the poor-rate as occupier of a fully licensed public-house called the Rising Sun Inn, in the parish of Bradford-on-Avon.

2. Prior to March, 1897, the premises were assessed at 18*l.* 15*s.* gross estimated rental and 15*l.* rateable value.

3. In January, 1897, the premises were purchased at a

public auction by a firm of brewers for the sum of 2810*l.*, and they were the present owners. The premises were let by them to the appellant as a "tied" house on an annual tenancy at the rent of 27*l.* 10*s.*, and the appellant was the present tenant.

4. On March 1, 1897, a new valuation list was made, and on April 5, 1897, it was approved by the respondents, the assessment committee, and the premises were thereby assessed at 85*l.* gross estimated rental and 70*l.* rateable value.

5. On September 6, 1897, the appellant appeared before the assessment committee and objected to the last-mentioned assessment. The assessment committee thereupon altered the valuation list and reduced the assessment to 70*l.* gross estimated rental and 58*l.* rateable value.

6. The appellant appealed to the court of quarter sessions against the reduced assessment of 70*l.* gross and 58*l.* rateable value.

7. Upon the hearing of the appeal it was alleged that in recent years there had been great competition among rival firms of brewers in the district of Bradford-on-Avon and elsewhere for the purchase or renting on lease of licensed houses for the purpose of letting or sub-letting them to tenants as tied houses, and of thereby increasing the sale of their beer to such tenants.

8. It was further proved that, for the reasons mentioned in the last paragraph, if the licensed premises in question had been in the market to be let on a tenancy for a term of years, brewers intending to convert them into a tied house for the sale of their own beer only, would be willing to give therefor a rent sufficiently high to support the assessment appealed against; but that if the same were to be let on a tenancy from year to year only, brewers would probably give a rent higher by 10*l.* or 15*l.* a year than the rent of 27*l.* 10*s.* paid by the appellant as an ordinary tenant (and would recoup themselves by the profits on the sale of their beer), but that such increased rent would not be sufficiently high to support the assessment appealed against.

9. It was admitted by the respondents that the net annual value, within the meaning of the Parochial Assessments Act of

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1836 (1), was to be ascertained by arriving at the rent at which the premises might reasonably be expected to let on a tenancy from year to year, and not that at which the same might reasonably be expected to let on a tenancy for a term of years, and that therefore the assessment appealed against must in any event be reduced, and the appeal allowed.

10. It was proved that (*a*) if brewers were to be included in the area of competition as possible tenants of the premises, though they did not in fact intend themselves to occupy the same, but only to convert such premises into a tied house for the sale therein of their own beer, the rent at which the premises might reasonably be expected to let would be sufficiently high to support a gross estimated rental of from 40*l.* to 45*l.*; and (*b*) that if such brewers were to be excluded from the area of competition as possible tenants of the premises, and if the said area of competition was to be restricted to such intending tenants as would themselves occupy the premises as ordinary tenants of a free house, the rent at which the premises might reasonably be expected to let would only be sufficiently high to support a gross estimated rental of from 30*l.* to 35*l.*

11. The appellant contended that the true test of the net annual value of the premises within the meaning of the Act of 1836 was the rent that an ordinary tenant intending to occupy the premises from year to year as a "free" house for the purpose of carrying on his own retail business as a publican would give, not what a brewer in competition with other brewers would give for the purpose of converting the premises into a "tied" house for the exclusive sale of his (the brewer's) beer, thereby increasing the profits of his own business.

(1) 6 & 7 Will. 4, c. 96, s. 1: "No rate for the relief of the poor . . . . shall be allowed by any justices or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. . . ."

12. The respondents contended that the net annual value of the licensed premises within the meaning of the Act of 1836 was their value to the owner, and not their value to the tenant in fact occupying the same, and that the premises should be assessed at the value at which they would let to a hypothetical tenant from year to year (all possible competitors who would be willing to take the premises from the owner being taken into account as possible hypothetical tenants), and that, therefore, the competition of brewers ought to be taken into consideration, although they did not in fact themselves intend to occupy the premises, and that the area of competition ought not to be restricted to such intending tenants as would themselves occupy the premises in question.

13. The court of quarter sessions held that in arriving at the gross estimated rental and rateable value it was the hereditament, independently of and without reference to any personal contract with brewers, that had to be assessed—in fact, the "free" house, not excluding brewers as competitors, but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract, and the Court ordered the gross estimated rental to be assessed at 35*l.*

The question for the opinion of the Court was whether the decision of the court of quarter sessions was right.

Foote, Q.C. (*F. R. Y. Radcliffe* and *T. H. Parr* with him), for the appellants (the respondents below). The court of quarter sessions have proceeded upon a wrong principle. The annual value to be taken into account is not the value of the premises to the occupying tenant; it is the value to the owner: *Reg.* v. *Wells* (1), per Cockburn C.J. (2) If by reason of the competition amongst brewers in the district he can get a much larger sum than would be given by persons seeking to become tenants of a "free" house, the gross estimated rental ought to be fixed at that larger sum. From the statement of this case it appears that the justices at quarter sessions, although they say that they have not excluded the brewers as

(1) (1867) L. R. 2 Q. B. 542. (2) L. R. 2 Q. B. at p. 547.

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competitors, have really based their value upon what an ordinary tenant of a "free" house would be willing to give.

Bucknill, Q.C. (*H. L. Lopes* with him), for the respondent (the appellant below). In arriving at the gross estimated rental the court of quarter sessions have applied the right principle. They have taken into account the competition of the brewers, and have declined to fix the gross estimated rental at any exaggerated sum which a brewer might be found to give as rent in order to make large profits by sub-letting the premises as a tied house. They have rightly acted on the principles laid down by the Court of Appeal in *Dodds* v. *South Shields Assessment Committee* (1) and *Sunderland-near-the-Sea Overseers* v. *Sunderland Union*. (2)

Foote, Q.C., replied.

Cur. adv. vult.

May 24. The following written judgments were delivered:—

RIDLEY J. This was a case stated by the court of quarter sessions for the county of Wilts, upon an appeal by the occupier of a public-house in the parish of Bradford-on-Avon, against the assessment of such house to the poor-rate. The assessment committee had assessed the house at 85*l.* gross estimated rental and 70*l.* net rateable value; but the court of quarter sessions reduced the assessment to 35*l.* gross estimated rental and 28*l.* net rateable value. It was not contended before us that the value put on the house by the assessment committee could be maintained, but it was contended that the gross estimated rental should be 45*l.*, and not 35*l.* The point arose in the following way:—The house, in January, 1897, was purchased by a firm of brewers for a large sum, and by them let to the appellant as a tied house, on a rental of 27*l.* 10*s.* per annum. It was not argued that this figure furnished the proper rental on which to base the rateable value; nor, since the decision of *Sunderland-near-the-Sea Overseers* v. *Sunderland Union* (2), was it possible to do so with success. The rental must be estimated according to the Parochial Assessments Act of 1836, which

(1) [1895] 2 Q. B. 133. (2) (1865) 18 C. B. (N.S.) 531.

requires it to be based on the corporeal hereditament, taking into account the more permanent elements of value to be found therein, but without allowing for the effect of temporary contracts and other such accidents. It is the rent at which the premises may reasonably be expected to let on a yearly tenancy; not that at which they may let when certain contracts of a personal nature affecting the rental are in existence between the landlord and tenant. The hypothetical tenant is to be a tenant supposed to take the hereditament as it stands, and used as it is, so far as the use of the premises goes—that is to say, as a public-house, as ironworks, or a dwelling-house, as the case may be; but, whilst that is true, the value of the hereditament is not to be affected by contracts or conditions not directly bearing on the occupation or use of the property, but of a personal and collateral character. Now, in this present case the contention of the appellant below, as set out in paragraph 11 of the case, appears to me to be correct according to the rules above stated. The "ordinary tenant intending to occupy the premises from year to year as a 'free' house" is in the same position as the hypothetical tenant of the statute, and he is willing to give the rent for the premises, not for the business carried on upon them. The rent so estimated is found by the case to be 30*l.* to 35*l.*

On the other hand, the contention of the respondents below was that which is set out in paragraph 12 of the case. This can hardly be understood without reference to the earlier paragraph 10. But, upon reading the two together, it appears sufficiently clearly that the respondents' contention, as against that urged by the appellant (on which they relied to raise the rent from 30*l.* to 35*l.* to 40*l.* to 45*l.*), was this, that not only the competition which would be due to the situation and character of the hereditament was to be taken into account, but also the competition of brewers intending to use the premises as a tied house. In so far as this contention introduces into the estimate an element not referable to the rateable hereditament itself, but to some personal or temporary contract under which the business is to be carried on upon it, I think it is clearly wrong; and from the findings in the case, it is clear

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that it was by the introduction of such an element—that is, the use of the house as a tied house—that the gross estimated rental of 40*l.* to 45*l.* was arrived at by the respondents below. That is the only difference between the two contentions. In my opinion the court of quarter sessions was right in holding that the hereditament only had to be assessed, and that though the competition of brewers was not to be excluded in estimating the rent, they must be treated like other tenants from year to year of an hereditament unfettered by personal contract. The order of the court of quarter sessions should therefore be confirmed.

CHANNELL J. This was a case stated by the court of quarter sessions for the county of Wilts, on an appeal by the occupier of a public-house in Bradford-on-Avon against the assessment of his house for the purposes of poor-rate. The court of quarter sessions, on appeal, reduced the rate, and it is admitted that they were right in reducing it; but the respondents in the Court below (who are appellants before us, but whom it is convenient now to call the respondents) contended before us that the court of quarter sessions reduced the rating too much, and that the gross estimated rental should be assessed at 45*l.* per annum, and not at 35*l.* per annum, the sum fixed by the court of quarter sessions. The difficulty, such as it is, in ascertaining the correct amount at which the public-house should be rated, arises from the fact that a firm of brewers recently purchased the house for a large sum, and have let it to a tenant as a tied house, at a rent which is of course less than the rent which he would pay if he were not tied. It is clear, both on principle and authority, that the sum so paid nominally as rent, but really as part of the terms of a somewhat complicated contract, is no test of the market value of the premises, and is no guide to assist the rating authority in assessing the premises. Even the actual rent paid for a tenement where there are no such complications is only some evidence of the gross estimated rental for the purposes of rating, and where there are such complications the sum called rent is not any evidence at all. The rating authority, there-

fore, have to assess the tenement now in question wholly without regard to the sum actually paid by way of rent. They have also to assess it without reference to the sum actually paid by the brewer for the purchase of it. What they have to do is to find the annual market value in the way provided for by the Parochial Assessments Act, 1836—that is, by arriving at the rent at which the premises might reasonably be expected to let on a tenancy from year to year. The contest between the parties appears to be as to what effect, if any, ought to be given to the competition which at the present time undoubtedly exists almost all over England amongst brewers competing to get public-houses into their own hands. Now, the contention of the appellant in the Court below is stated in paragraph 11 of the case. This contention appears to me not to be precisely correct. It is rather liable to be misunderstood, and I cannot adopt it in the terms in which it is stated, though perhaps there is no substantial inaccuracy. The Act of 1836 says nothing about the hypothetical tenant occupying. The purpose for which a particular tenant wants the premises may possibly induce him to pay more than the market value for them; but, unless that is the case, the purpose for which the tenant wants the premises has nothing to do with the matter, except in this way—that property is to be rated, as it is said, "rebus sic stantibus"—that is to say, a public-house is to be rated on the assumption that it continues a public-house, and the question is not to be entered into as to whether a higher rent could be got for it by turning it into a bank, or an insurance office, or any other kind of business premises. To introduce the purpose for which the tenant is about to use the premises, and to consider whether that purpose is to carry on the trade himself or to underlet it to some one else to carry it on, seems to me to introduce extraneous considerations somewhat similar to those which it was attempted unsuccessfully to introduce in *Dodds* v. *South Shields Assessment Committee*. (1) If in fact there are so many competitors, whether brewers or others, desiring to obtain possession of public-houses as to

(1) [1895] 2 Q. B. 133.

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raise the value of public-houses in the district (the number of which is of course limited), that fact necessarily affects the sum which any tenant, whether brewer or not, may reasonably be expected to give; he will have to give that which the landlord will expect to get from others, or he will not be taken as tenant. I think that any circumstances which affect the annual value in the market must be taken into consideration in arriving at the gross estimated rental—that is, at the sum which may reasonably be expected to be obtained from a tenant from year to year; and therefore the demand which exists for public-houses, whether by brewers or others, must be considered, for that demand directly affects the value. The contention of the appellant is, however, well founded, to this extent—any sums which are paid by the tenant, not by reason of the value of the premises, but for reasons personal to himself, ought not to be taken into account. This follows from the decision in *Sunderland-near-the-Sea Overseers* v. *Sunderland Union*. (1) It has been said, and I think rightly, that the gross estimated rental is such a sum as may be assumed to have been arrived at by what is called the "higgling" of the market—that is, by bargaining between landlords and proposing tenants. It may be illustrated thus: Suppose the owner of a public-house, who is desirous of letting it, receives an offer from a brewer to take it as tenant from year to year at a certain rent: the owner might say to the brewer, "I will not take that rent from you; I know it is worth more than that to you; you will make large profits out of it by letting it as a tied house, and I shall not let it to you unless you will give me more." The brewer, being really anxious to make those profits, would probably give more. That sum is obviously given for reasons personal to the brewer; it has nothing to do with the market value of the premises, though the possibility of its being given may be a matter tending to raise the market value. Such a rent as that could not, in my opinion, be treated as a rent which might reasonably be expected to be obtained for the premises within the meaning of the Act of 1836, and

(1) 18 C. B. (N.S.) 531.

cannot be taken as the gross estimated rental. Again, suppose the owner of a public-house to have an offer of an ordinary tenant of a certain sum: he may say to him, "I shall not take that sum; there are a great many brewers wanting houses now, and if I wait I expect I shall find a brewer who will give me much more than you offer." Then the man offers him more and is accepted. That is evidence of an increase in the market value of the premises, and where such a demand for houses by brewers exists as to make it reasonable to expect that a landlord could get from any one a higher rent for his public-house than he would if that demand of the brewers did not exist, then that higher rent is a rent which may reasonably be expected to be obtained for the premises within the meaning of the Act of 1836, and the rating will be higher than if the demand did not exist. I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally. The contention of the respondents, which is stated in paragraph 12 of the case, appears to me to be correct, subject only to the doubt as to what is meant by the "competition of brewers being taken into consideration." If that means that the question should be considered whether the competition of brewers had raised the market value of public-houses in the district, then, in my opinion, it is right. If, however, it means that the special values which the brewers may, for reasons connected with their own business, be willing to give are to be treated as the gross estimated rental of the premises, because those sums might be obtained from brewers, then, in my opinion, it is wrong. The decision of the court of quarter sessions upon these contentions is stated in paragraph 13. Now, the statement in that paragraph down to and including the words "had to be assessed" is clearly right. Then the paragraph continues: "in fact the 'free' house, not excluding the brewers as competitors." Therefore, it seems that they have not adopted

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that part of the appellant's contention which seems to me to be erroneous. They have not excluded brewers as competitors as they were invited to do, but have for some purpose considered the effect of their competition. The paragraph continues: "but treating them, like other tenants from year to year, as tenants of an hereditament unfettered by any personal contract." That statement is not quite clear. The brewers would not in any case be fettered by a personal contract, and the house is necessarily free when they take it. It probably means, not taking into account any sums over and above market value, which the brewers might be willing to give for purposes of their own to carry out their object of making it a tied house. In that view the decision of the court of quarter sessions is right, and the only thing that during the course of the argument made me doubt the correctness of the decision was that the sessions go on to fix the gross estimated rental at 35*l.*, which is one of the figures mentioned in paragraph 10 (*b*) as the rental, on the assumption that "brewers were excluded from the area of competition"; and the court of quarter sessions, though expressly stating that it did not exclude the brewers, nevertheless adopts the figure stated as the rental if they were excluded. I think the explanation is that in paragraph 10 (*a*) the 40*l.* to 45*l.* means the sum for which the premises would let to the brewers but not to any one else—that is what I have called the special sums; and if so, it is, in my opinion, clear that the court of quarter sessions was right in rejecting that as the gross estimated rental. Paragraph 10 (*b*) states that the rental would be from 30*l.* to 35*l.* if brewers were excluded. This gives a margin of 5*l.*, and possibly the court of quarter sessions thought that if the possible raising of the market value of public-houses by the competition of brewers was taken into account it would not raise the rental beyond 35*l.* If so, the court of quarter sessions was right in fixing the gross estimated rental at 35*l.* In any case, the only question, in my opinion, on the facts as stated, is whether 35*l.* is the right figure, or some figure between 35*l.* and 40*l.* We could not interfere with the decision of the court of quarter sessions on such a point as that, and I have endeavoured to explain my

opinion upon the questions of principle involved. I think the court of quarter sessions was right in principle, and that the order must be confirmed, and with costs.

Judgment for the appellants.

Solicitors for appellants: *Berkeley, Calcott, Holloway & Tudor, for Beavan & Compton, Bradford-on-Avon.*

Solicitors for respondent: *Eyre, Dowling & Co., for C. J. Jones, Trowbridge.*

W. A.

BENFORD, APPELLANT; SIMS, RESPONDENT.

1898

May 17.

Justices — Offence Punishable upon Summary Conviction — Information — "Counselling" Commission of Offence—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—12 & 13 *Vict. c.* 92, *s.* 2.

A person who has counselled the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed such offence as a principal offender.

A defendant was, therefore, held liable to conviction upon an information which charged him with having cruelly ill-treated a horse by causing it to be worked in an unfit state contrary to s. 2 of 12 & 13 Vict. c. 92, although the offence proved was that he had knowingly counselled the owner of the horse to cause the act of cruelty to be done.

CASE stated under the Summary Jurisdiction Acts by the stipendiary magistrate for the borough of Cardiff.

The respondent was summoned before the magistrate to answer an information preferred by the appellant charging that the respondent did, on December 13, 1897, "unlawfully cruelly ill-treat a horse by causing it to be worked while in an unfit state," contrary to s. 2 of 12 & 13 Vict. c. 92. (1)

On the hearing of the information it was proved that the

(1) 12 & 13 Vict. c. 92, s. 2: "If any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds."

By s. 14 complaints under the Act may be heard and determined before a justice of the peace in a summary way.

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respondent, a veterinary surgeon, had examined a mare belonging to one Hunt, a coal merchant, and prior to December 13, 1897, had given Hunt a certificate that the mare was free from pain and quite fit for her work. On December 13, 1897, she was being worked by a driver employed by Hunt. She was very lame, in great pain, and suffering from long-standing disease of the feet. There was other evidence that the respondent had advised Hunt to work the mare.

The magistrate found as facts that working the mare on December 13, 1897, was an act of cruelty; that such act of cruelty was knowingly perpetrated by the driver, and knowingly caused to be committed by the owner; that the owner was a person in a position of authority to direct the driver to work the mare; that the respondent was not a person in a position of authority to direct the owner to cause the mare to be worked; that the respondent knowingly counselled the owner to cause the act of cruelty to be perpetrated, and that the owner was in some degree influenced by such counsel to cause the act to be perpetrated. The magistrate dismissed the information on the grounds, substantially—that "although the advice of the respondent in some degree influenced the owner to cause the animal to be worked, such advice was the remote cause of the cruelty in some degree, and not the proximate cause of the cruelty in any degree, and, therefore, not the cause of the cruelty within the meaning of the statute; and that the respondent was charged with the offence committed by the owner, and not with the offence disclosed by the facts—namely, knowingly counselling an act of cruelty to be caused." The question for the opinion of the Court was whether the magistrate's decision was right, and if not, what should be done in the premises.

Colam, for the appellant. By s. 5 of the Summary Jurisdiction Act, 1848 (1) (Jervis's Act), the respondent could properly

(1) 11 & 12 Vict. c. 43, s. 5: "Every person who shall aid, abet, counsel, or procure the commission of any offence, which is or hereafter shall be punishable on summary conviction, shall be liable to be proceeded against and convicted for the same, either together with the principal offender,

be charged in the information as a principal jointly with Hunt and the driver. He need not be charged with counselling, aiding, or abetting the principal offender. It is immaterial that the principal is not charged at the same time. In cases of felony, principals and accessories can be charged in the indictment jointly with the principal offence under the provisions, which are analogous to those in s. 5 of Jervis's Act, of 24 & 25 Vict. c. 94, s. 1, which enacts that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon." Counselling to cause an act of cruelty to be committed is the same thing as causing it to be committed. "Causing" is the same as "procuring," and the words "aiding, abetting, counselling or procuring" in s. 5 of Jervis's Act mean the same: *Ex parte Smith* (1), judgment of Martin B. (2)

Even if there were a variance between the charge and the evidence in support of it, that could only be matter for adjournment, under s. 1 of Jervis's Act, if the magistrate thought that the defendant had been deceived or misled. [He also referred to *Wilson* v. *Stewart* (3); *Stacey* v. *Whitehurst*. (4)]

No counsel appeared for the respondent.

RIDLEY J. I should have been glad if we had had the assistance of an argument by counsel for the respondent; but, as we have not had that assistance, we must act upon our view of the matter as it stands. The magistrate has found that the respondent knowingly counselled the owner to cause the act of cruelty to be perpetrated, but that he did not cause it to be perpetrated in the sense in which the word is used in s. 2

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or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, and may be proceeded against and convicted either in the county, riding, division, liberty, city, borough or place where such principal offender may be convicted, or that in which such offence of aiding, abetting, counselling, or procuring may have been committed."

(1) (1858) 27 L. J. (M.C.) 186.

(2) 27 L. J. (M.C.) at p. 188.

(3) (1863) 3 B. & S. 913.

(4) (1865) 34 L. J. (M.C.) 94.

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of the Cruelty to Animals Act of 1849, for the reason—to quote the magistrate's words—"that though the advice of the respondent in some degree influenced the owner to cause the animal to be worked, such advice was the remote cause of the cruelty in some degree, and not the proximate cause of the cruelty in any degree, and, therefore, not the cause of the cruelty within the meaning of the statute."

I think it is correct, probably, to say that the word "cause" used in s. 2 of the Act of 1849 is used in a stricter sense than the words "procure" or "counsel" in the 5th section of Jervis's Act, and that to "cause" means "to be the immediate cause" of the offence being committed. And I think it may be correct to say that there was no evidence in the case on which the magistrate ought to have found that in that sense the respondent was the cause of this act of cruelty. I can conceive cases in which a veterinary surgeon might properly be found to have actually caused the act of cruelty to the animal in question, although not the owner of it, and although not in a position to order the owner to do anything; but it does not appear to have been so here. The magistrate, however, proceeds to say that, as the respondent was charged with the offence committed by the owner, and was not charged with the offence disclosed by the facts, he must be discharged; and the question now arises, whether under the 5th section of Jervis's Act it was not competent for the magistrate to proceed upon this information, and, upon the facts he has found, convict the respondent. He seems to have been of opinion that, in order to enable the proceedings to be properly conducted to a conviction, the information should have stated, not the principal offence, but the aiding, abetting, counselling, or procuring the commission of the principal offence. In my opinion, however, s. 5 of Jervis's Act may properly be read as meaning that a person who knowingly counsels such offences to be committed is to be proceeded against and convicted for the same either together with the principal offender, or before or after his conviction, and may be treated throughout as the principal offender. It is true that in the analogous section in the Act of 1861 (24 & 25 Vict. c. 94), s. 1, which deals with accessories and

abettors in cases of felony, the words used are that the accessory "may be indicted, tried, convicted and punished in all respects as if he were a principal felon," whereas the words in s. 5 of Jervis's Act are, "shall be liable to be proceeded against and convicted for the same"; and I suppose that, in order to make those two sections precisely analogous, the words in s. 5 should have been "informed against," so as to provide that the form of the information might be precisely the same in the case of aiders, abettors, counsellors, or procurers as in the case of the principal offender. That distinction, however, is not, in my view, sufficiently marked to compel us to say that s. 5 of Jervis's Act must be read as meaning that the aider, abettor, counsellor, or procurer must, in the preliminary proceedings, as matter of form, be charged as such aider, abettor, &c., and that then he may be convicted as a principal. That is what must be the argument for the appellant, and the magistrate has given effect to it. I do not think that in the information the person who counsels the committing of an offence must be charged as counselling it, and afterwards be convicted as though he were a principal offender. If the words were clear and certain, one would be obliged to say that that was their meaning; but I do not find that they are so. The words are "to be proceeded against," and, primâ facie, I think that a preliminary proceeding such as the information is meant to be included in the word "proceedings," although not named in the same way as the indictment is named in s. 1 of the Accessories and Abettors Act of 1861.

It appears to me, therefore, that the magistrate on his findings of fact might have convicted the respondent, he having, according to the magistrate's finding, knowingly counselled the owner to cause the act of cruelty, and might under s. 5 of Jervis's Act have found him guilty of the same offence as if he had been a principal offender. In my opinion the case should go back with the intimation of that opinion to the magistrate, and a direction to him to convict.

CHANNELL J. I am entirely of the same opinion. I think that the only difficulty in the case, having regard to the very

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special findings of the magistrate, is the construction of s. 5 of Jervis's Act; and it certainly does seem odd that, as the Act has been passed for fifty years, there is no more authority on it than has been brought to our attention, or than we have been able to find in our search during this argument. I agree that it is unfortunate to a certain extent—although of course we do not suggest that counsel for the appellant would not have brought any authorities before us that he knew of—that we have not had an argument for the respondent in order to ascertain whether there has been any authority on this subject during these fifty years. Assuming that there has not, it seems to me that the true construction of s. 5 is to make anybody who aids, abets, counsels, or procures, liable to be proceeded against in every respect as if he were a principal offender. I think that if in this case the owner, the driver, and the veterinary surgeon had been together charged with committing this offence they might have been convicted, and the respondent would not have been able to escape by saying, "I did not do the thing itself; I only aided and abetted it." I think that must be so. If so, it seems to follow that there ought to have been a conviction. It is the magistrate's own view that there ought to be. I must point out that our decision proceeds on the very special finding in this case, and affords no ground whatever for supposing that a veterinary surgeon, who gives a wrong opinion and commits an error in judgment, is liable to be convicted of cruelty, if the effect of his opinion being followed is that the act of cruelty does in fact result.

Judgment for the appellant. Case sent back to the magistrate to convict.

Solicitor for appellant: *S. G. Polhill.*

W. A.

[COURT FOR CROWN CASES RESERVED.]

1898
Aug. 6.

THE QUEEN *v.* HOBBS.

Criminal Law—Gaming—House used for purpose of a Sweepstake—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

A person who permits his house to be used for the sale of tickets and the receipt of purchase-money for such tickets in an ordinary sweepstake on a horse-race does not commit any offence against the Betting Act, 1853.

CASE stated by Hawkins J.

At the last Lewes Assizes an indictment consisting of three counts came on for trial before me, upon which I directed a verdict of guilty upon the first and second counts, subject to the opinion of the Court for Crown Cases Reserved upon the question stated below. Upon the third count I directed a verdict of not guilty for reasons immaterial to the question reserved.

The two counts upon which the defendant was convicted were founded upon the second branch of s. 1 of the statute 16 & 17 Vict. c. 119, and s. 3 of the same statute, and the following are copies of them :—

"Sussex to wit.—The jurors for our Lady the Queen upon their oath present that Lewis Irvin Hobbs on the 18th day of April, in the year of our Lord 1898, and on divers days and times between that day and the 11th day of May in the year aforesaid, at the parish of St. Mary Magdalen, in the borough of Hastings in the said county, being then the occupier of a certain house known by the sign of 'The Yorkshire Grey,' situated in the London Road in the said parish, unlawfully did use the said house for the purpose of money being received by and on behalf of him, the said Lewis Irvin Hobbs, the occupier, as and for the consideration for promises and agreements to pay thereafter money, to wit, a sum of 45*l.*, a sum of 20*l.*, a sum of 10*l.*, and 100 other sums of 5*s.* each, on certain events of and relating to a horse-race called 'The Derby Stakes,' to the great damage and common nuisance of all the liege subjects of

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our said Lady the Queen, to the evil example of all others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity. And the jurors aforesaid upon their oath aforesaid do further present that heretofore, to wit, on the 19th day of May in the year aforesaid, and after the commission of the said offence, the said Lewis Irvin Hobbs was in due form of law charged before a court of summary jurisdiction sitting in the said borough of Hastings with the said offence, and on appearing before the said Court and before the said charge was gone into did claim to be tried by a jury pursuant to s. 17 of the Summary Jurisdiction Act, 1879.

"Second count.—And the jurors aforesaid upon their oath aforesaid do further present that the said Lewis Irvin Hobbs on the said 18th day of April, in the year of our Lord 1898, and on divers days and times between that day and the 11th of May in the year aforesaid, at the parish of St. Mary Magdalen, in the borough of Hastings in the said county, being then the occupier of a certain place, to wit, the bar of certain licensed premises known by the sign of 'The Yorkshire Grey,' situated in London Road in the said parish, unlawfully did use the said place for the purpose of money being received by and on behalf of him, the said Lewis Irvin Hobbs, the occupier, as and for the consideration for promises and agreements to pay thereafter money, to wit, a sum of 45*l.*, a sum of 20*l.*, a sum of 10*l.*, and 100 other sums of 5*s.* each, on certain events of and relating to a horse-race called 'The Derby Stakes,' to the great damage and common nuisance of all the liege subjects of our said Lady the Queen, to the evil example of others in like case offending, and against the peace of our Lady the Queen, her Crown and dignity. And the jurors aforesaid upon their oath aforesaid do further present that heretofore, to wit, on the 19th day of May in the year aforesaid, and after the commission of the said offence, the said Lewis Irvin Hobbs was in due form of law charged before a court of summary jurisdiction sitting in the said borough of Hastings with the said offence, and on appearing before the said Court and before the said charge was gone into did claim to be tried by a jury pursuant to s. 17 of the Summary Jurisdiction Act, 1879."

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In my summing-up to the jury I stated fully all the material facts and the question of law which arose upon them. That summing-up was as follows: The question raised upon this indictment is whether the sale of and receipt of the purchase-money for tickets in an ordinary Derby sweepstake by a licensed victualler in the bar of the licensed house occupied by him amounts to an offence created by the Betting Act, 1853. The material facts are few and simple. The defendant Lewis Irvin Hobbs was, from April 18 to May 11, 1898, both days inclusive, the licensed occupier of the Yorkshire Grey at St. Leonards-on-Sea. He had been such occupier for some eight or nine years previously, and during each of those years a sweepstake similar in all respects to that now in question had been promoted by him on the approach of the "Derby day." It was a sweepstake to consist of 1000 subscriptions of 2*s.* 6*d.* each, which, assuming all the subscriptions were made, would raise a sum of 125*l.*, of which 10 per cent., amounting to 12*l.* 10*s.*, was to be deducted for expenses, leaving a balance of 112*l.* 10*s.* for distribution among the subscribers in the following manner:—

	£	*s.*	*d.*
To the drawer of the first prize (that is, the winner of the race)	45	0	0
Second prize, i.e., the second horse . .	20	0	0
Third „ „ third „ . .	10	0	0
To the drawers of 100 non-starters, 5*s.* each	25	0	0
Remainder to be divided amongst runners	12	10	0
	£112	10	0

A ticket was on payment of 2*s.* 6*d.* issued to each subscriber for each ticket subscribed for by him. These tickets were before issue bound up in books (similar in form to bank cheque-books) of twenty-five tickets each, with counterfoils attached on which to write the name of the purchaser. As each ticket was paid for it was detached from its counterfoil and handed to the purchaser, whose name and address were written on the counterfoil. The tickets were distributed—some in the

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Yorkshire Grey by the defendant himself and by his wife and barmaid, who assisted him in the conduct of his house, and some by other persons to whom books were entrusted away from the premises, one of such books for this year's sweepstake, from which six tickets had been sold, having been found on the person of one Talbot, as hereinafter mentioned; the names of other recipients of other books, containing 475 tickets, being found entered in a memorandum-book of the defendant.

A man named Maule, a porter formerly in the service of the defendant, on April 18 last (having been employed by the police so to do) went to the Yorkshire Grey and purchased a ticket from defendant's wife. On April 23 a similar ticket was sold in the house to a customer. On Sunday, April 24, two tickets were sold by the barmaid in the presence of the defendant, who in reply to some observation said, "You can spot [or find] the winner on Sunday as well as any other day." On April 29 defendant himself sold Maule, who paid 2*s.* 6*d.* for it, another ticket. The whole of these sales were openly made.

There was no drawing for the prizes in this present year, because before the time had arrived the Yorkshire Grey was raided by the police, which, of course, stopped further proceeding with the sweepstake. But the drawings for each of the years 1896 and 1897 were held at Saxon Chambers, a house adjoining, but forming no part of the Yorkshire Grey. At each drawing about twenty persons were present; the witness Maule was doorkeeper on those occasions, and for his services he was paid by the defendant, who in fact paid all the other expenses connected with the sweepstakes, including those of this year; and, if the fact be important, I have no reason to think that the 10 per cent. deducted for expenses was an unreasonable amount for that pupose.

No other evidence was given or offered of any matter connected with the sweepstake than that I have mentioned. It was not even suggested that the defendant, who took no ticket, was either to receive any part of the money subscribed, except expenses as already mentioned, or to supply or make good any deficiency in the event of all the tickets not being sold, and he gave no guarantee or promise to pay anything to anybody,

except to distribute the money actually subscribed among the subscribers according to the terms of the tickets. On May 11 the inspector of police, under a search-warrant issued under the Betting Act, 1853, searched the Yorkshire Grey, but in the house found nothing beyond some books of tickets, some of which had been issued and torn from the counterfoils, and a book with names and addresses obviously of persons to whom similar books had been entrusted. A person named George Talbot was in the bar, where he was a daily visitor; it was said by the inspector that he was a betting-man, and on search there were found upon him some papers and telegrams (one addressed to him at the Yorkshire Grey) which went strongly to prove that the inspector's description of him was correct. But there was nothing to indicate either that the defendant was concerned in betting, or that any bets were ever made in his house.

On this state of things, Mr. Muir, for the defendant, objected that there was no evidence which could properly be submitted to the jury in support of this indictment; Mr. Horace Avory, for the prosecution, contending to the contrary.

For the purposes of this case, it was conceded by Mr. Muir that the sweepstake in question was a lottery; and I am strongly inclined to the opinion that it was so, although, as this indictment was only preferred under the Betting House Act, it is not necessary to pronounce any judgment upon that point. As to its being a lottery, therefore, I will only refer to the case of *Mearing* v. *Hellings*. (1) The mere fact, however, of its being a lottery would be no bar to proceedings under the Betting House Act, if the facts of the case would otherwise bring it within the operation of that statute.

So far as I am aware, the question whether such connection with an ordinary Derby sweepstake as is established against the defendant is sufficient to support the present indictment has now arisen for the first time. It must be taken that there is no evidence to support any other offence against that section.

The second branch of that section forbids the use of a house or place for the purpose of any money being received by or on

(1) (1845) 14 M. & W. 711.

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behalf of the owner or occupier, &c., as or for the consideration for any promise or agreement, &c., express or implied, to pay or give thereafter any money or valuable thing "on any event or contingency of or relating to any horse-race, &c., or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such events or contingency as aforesaid."

I am strongly inclined to think that such a sweepstake as that described in this case constitutes, either expressly or impliedly, an agreement between each member or ticket-holder in it that each member in respect of each ticket he holds shall be entitled to draw in his proper time a ticket bearing a number corresponding with the number attached to the name of some horse entered for the Derby, and appearing on a list of such horses prepared and recognised by all as the list of horses in respect of which the sweepstake is established. No member is entitled to claim anything until after the race has been run and the result declared; and then each holder of a ticket becomes entitled to receive the prize or other sum of money mentioned on his ticket, having regard to the position or place in the race of the horse indicated by the number drawn by him.

The destination of every sum of money paid into the sweepstake, after deduction of expenses, is dependent on the event or contingency of a horse-race, and every title to a share of the distribution is dependent on the like contingency. The consideration for this agreement is the money paid by each member on the purchase of his ticket or tickets—that which he is to receive in return clearly is dependent on the event or contingency of the race.

Now as to the defendant's responsibility. In every such sweepstake as the present there must be somebody to receive and hold the price of the tickets till the event of the race is ascertained; there must also be someone to distribute the amount to which members are entitled: both these offices seemed to have been undertaken by the defendant. Some at least of the moneys were received by him at his house, the Yorkshire Grey. Can it be said that in undertaking these offices the defendant did not impliedly or expressly promise and undertake

with and to each subscriber to pay the moneys found to be due on the happening of the event or contingency upon which his title to it depended according to the agreement?

I think it unnecessary to discuss any other part of this section. My present impression (the evidence being unquestioned) is that the defendant has rendered himself liable to the penalty imposed by s. 3 of the Act, and that the jury ought to find him guilty upon the first and second counts of this indictment.

The opinion I have expressed above is that which I have necessarily hastily formed without having an opportunity of referring to any of the authorities cited. The point is a new one: it affects a wide circle—wider perhaps than at first sight may be apparent. I purpose, therefore, to reserve the question of law for the consideration of the Court for Crown Cases Reserved, and I respite judgment until the next assizes, or until the opinion of the Court for the Consideration of Crown Cases Reserved is known.

R. D. Muir, for the prisoner. The conviction is wrong. This was an ordinary sweepstake, which may be a lottery within the meaning of the Lottery Acts, but which is not in any way affected by the Betting Act, 1853. That Act was intended to deal with betting or wagering in the ordinary sense. In *Carlill* v. *Carbolic Smokeball Co.* (1) Hawkins J. defines a wagering contract as "one by which two persons professing to hold opposite views touching the issue of a future uncertain event mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties." There was no such contract here between the defendant and any other person. The money subscribed became payable, not on the event of the race, but on the event of the drawing; and that drawing would be equally

(1) [1892] 2 Q. B. 484, at p. 490.

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effectual if it were to take place after the race had been run. Because this transaction may have amounted to a lottery, that does not bring it within the Betting Act, as appears from *Caminada* v. *Hulton* (1) and *Stoddart* v. *Sagar* (2), in which separate informations were laid under the Lottery Acts and under the Betting Act, 1853.

[He was stopped.]

Horace Avory, for the prosecution. There is no doubt that this amounted to a lottery: *Allport* v. *Nutt* (3); but that does not necessarily bring it within the provisions of the Betting Act, 1853. But although it is a lottery, it may also be an offence against the Betting Act: *Stoddart* v. *Sagar*. (2) This was an offence against the second part of s. 1 of that Act. (4) There was in effect a bet by the defendant with every subscriber to the sweepstake that he would not draw the name of the winning horse. Such a transaction falls within the express words of the statute whether it is in fact a bet or not. The defendant received this money as consideration for his promise to pay to the persons drawing the names of the winning horses certain fixed sums.

R. D. Muir was not called upon to reply.

LORD RUSSELL of KILLOWEN C.J. My brother Hawkins at the trial expressed grave doubts whether this conviction could be supported, and in my opinion those doubts were well

(1) (1891) 60 L. J. (M.C.) 116.

(2) [1895] 2 Q. B. 474.

(3) (1845) 1 C. B. 974.

(4) By the Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1, "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person procured or employed by, or acting for or on behalf of, such owner, occupier, keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

founded. I think that there was no evidence proper to be left to the jury in respect of either of the two counts which are now before us for our consideration. The importance of the case makes it desirable that I should make clear the grounds on which I have arrived at this conclusion. In the first place, as I pointed out in the course of the argument, the allegation that the defendant was a licensed victualler is wholly irrelevant and immaterial. The offence charged against him would have been precisely the same if he were not a publican, and if this sweepstake had been got up in any club or society of persons. It is unnecessary for us now to express any opinion whether this sweepstake amounted to a lottery or not, and whether an offence against the Lottery Acts was committed by the defendant. I am inclined to think that what took place did in fact amount to a lottery, and nothing but a lottery; and I am quite clear that in no sense was it a betting transaction within the meaning of 16 & 17 Vict. c. 119. It is said that what was done amounted to an offence within the second part of s. 1 of that Act. It is not unimportant to observe that, at the time the Betting Act of 1853 was passed, the Acts relating to lotteries, as quite distinct subjects from betting transactions, had long been in existence. The Act was intituled "An Act for the Suppression of Betting Houses," and it recited that "Whereas a kind of gaming has of late sprung up, tending to the injury and demoralisation of improvident persons, by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies." It then proceeds to deal with evils so set forth. By the first part of s. 1 it is enacted (I omit the immaterial words) that no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof betting with persons resorting thereto. That is the offence created by that part of the section—the opening, keeping, or using of a house for the purpose of betting with persons resorting thereto. Probably the learned counsel for the prosecution was quite right in saying that this part of the section would apply to

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both kinds of betting, both to ready money and to credit betting, by persons resorting to the house for that purpose. But it is with the second part of the section that we are chiefly concerned. That deals, not with betting by persons resorting to a place, but with opening, keeping, or using a house, office, room, or other place "for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or other person . . . . as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race . . . . or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency. . . ."

The question that we have to decide is whether there was any evidence to go to the jury that the house was used for the purpose of any money being received by the defendant as or for the consideration of any agreement to pay or give any money on any event or contingency relating to any horse-race. The first requirement is, as it seems to me, that there should be a contractual transaction between the owner or occupier of the house and the person desiring to bet. That was not the case here. The defendant, probably for the sake of his own personal popularity or that of his licensed house, allowed and encouraged persons to take tickets for this sweepstake. He appears to have taken no tickets himself, and to have derived no pecuniary profit whatever from the transaction. It is stated in the case that, "It was not even suggested that the defendant, who took no ticket, was either to receive any part of the money subscribed except expenses" (which the learned judge considers to have been reasonable), "or to supply or make good any deficiency in the event of all the tickets not being sold, and he gave no guarantee or promise to pay anything to anybody, except to distribute the money actually subscribed among the subscribers according to the terms of the tickets." What really happened was that a number of persons were willing to join in this venture, and that the defendant was willing to distribute the sum received in the proper proportions. Therefore, as I have

said, there was no contractual liability on his part towards the subscribers. For the same reason, I do not think that the money was received by or on behalf of the defendant within the meaning of the section. Further, as it seems to me, there was not here a promise to pay money on any event or contingency relating to a horse-race. It is clear that the event or contingency in respect of which the money was to be paid was not the horse-race, but the drawing, and, as has been pointed out, that drawing would be equally good if it took place after the race had been run. That seems to shew that the promise to pay was not dependent upon the event of the race, but on the event of the drawing. Therefore, in my opinion, this transaction does not fall within the second part of s. 1 of the Betting Act, 1853. If one looks at the rest of that Act, the opinion that I have expressed is strengthened, and it becomes clear that the Act was not intended to deal with transactions of this kind, but with betting pure and simple; in other words, with bets in respect of future contingencies or results of horse-races and the like. Sect. 7 makes this very clear. It imposes penalties on any person exhibiting or publishing, or causing to be exhibited or published, any placard, handbill, card, writing, sign, or advertisement, whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid, or any person who on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers in manner aforesaid." In my judgment, this case does not fall either within the letter of, or the mischief aimed at by, the Act in question, and there was no evidence proper to be left to the jury on which they could find a verdict against the defendant. I do not say that the conduct of the defendant did not amount to a criminal offence. My impression is that it did, and that, if proceedings had been taken against the defendant under the Lottery Acts, he might

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have been convicted. That, however, it is unnecessary for us now to decide. All that we need now say is that no offence was made out under the Betting Act, 1853, and that the conviction must therefore be quashed.

HAWKINS, MATHEW, KENNEDY, and BIGHAM JJ. concurred.

Conviction quashed.

Solicitor for prosecution: *B. F. Meadows, Hastings.*
Solicitors for defence: *Jones & Glenister, Hastings.*

A. P. P. K.

[COMMERCIAL COURT.]

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July 12;
Aug. 10.

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Negotiable Instrument—Debenture Payable to Bearer—Usage.

The plaintiffs, a limited company, were possessed of certain debentures, issued by an English company in England and payable to bearer, which by reason of the conditions indorsed thereon were not promissory notes. These debentures were kept in a safe, the key of which was entrusted to the plaintiffs' secretary. The secretary, in fraud of the plaintiffs, took the debentures from the safe and pledged them with the defendants for advances made to him by them. The defendants received the debentures in good faith. It was proved that the usage in the mercantile world and on the Stock Exchange for many years had been to treat such debentures as negotiable instruments transferable by mere delivery:—

Held, that although the plaintiffs were not estopped by their conduct from denying the defendants' title, yet the defendants were entitled to the debentures as against the plaintiffs on the ground that the debentures were negotiable instruments transferable by delivery.

Crouch v. *Crédit Foncier of England*, (1873) L. R. 8 Q. B. 374, has been in effect overruled by *Goodwin* v. *Robarts*, (1875) L. R. 10 Ex. 337; (1876) 1 App. Cas. 476.

ACTION tried before Kennedy J. in the Commercial Court.

The action was brought to recover the value of twenty 6 per cent. debentures of the Beira Junction Railway Company, Limited, which had been fraudulently taken from the plaintiffs' safe by their secretary, a man named Evans, and pledged

by him with the defendants as security for an advance made to him by them. The defendants received the debentures in good faith, Evans as secretary to the plaintiffs possessing the key of their safe and being in the habit of dealing with their securities.

The Beira Junction Railway Company was an English company, and the debentures were issued in England and were in the following form :—

"Debenture No.

"The Beira Junction Railway (Port Beira to Fontesville), Limited, hereinafter called the company, will on the 1st day of July, 1925, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions indorsed hereon, pay to the bearer or, when registered, to the registered holder for the time being hereof, on presentation of this debenture, the sum of one hundred pounds.

"The company will, so long as any principal moneys remain due hereunder, pay interest thereon at the rate of six per cent. per annum by half-yearly payments on the 1st day of January and the 1st day of July in each year, the first of such half-yearly payments to be made on the 1st day of January next.

"The holder of this debenture is to be entitled to the benefit and to be bound by the provisions of an indenture dated the 16th day of October, 1895, and made between the company of the one part and Francis Pavy and Bertram Temple Rose, as trustees for the debenture-holders, of the other part, whereby certain property of the company is charged as security for the debentures of this issue.

"This debenture is issued subject to the conditions endorsed hereon.

"Given under the common seal of the company this 9th day of December, 1895.

"The common seal of the company was affixed hereto in the presence of

"L. Wagner, Director.

"W. Rowland Hart, Secretary."

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The conditions indorsed on the debentures were (so far as is material) as follows:—

"(3.) Except when registered, this debenture is transferable by delivery, but the company will, at any time upon the request of the bearer whilst unregistered, register him or his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration thereon; and the company will also at any time, upon the request in writing of the registered holder, his executors or administrators, cancel the registration and the note thereof indorsed thereon; and thereupon this debenture will again become transferable by delivery. A fee of 2*s*. 6*d*. shall be paid to the company upon every such registration or cancellation.

"(4.) A register of the debentures will be kept at the company's registered office, wherein there will be entered the names, addresses, and descriptions of the registered holders, and particulars of the debentures held by them respectively.

"(5.) The registered holder of this debenture when registered will be regarded as exclusively entitled to the benefit of this debenture, and all persons may act accordingly; and the company shall not be bound to enter in the register notice of any trust, or to recognise any right in any other person save as herein provided.

"(6.) Every transfer of this debenture when registered must be in writing under the hand of the registered holder or his legal personal representative. The transfer must be delivered duly stamped at the registered office of the company with a fee of 2*s*. 6*d*., and such evidence of identity or title as the company may reasonably require, and thereupon the transfer will be registered. Except whilst the same shall be registered, the bearer for the time being is entitled to the full benefit of this debenture, and all persons may act accordingly, and shall be deemed to adopt this condition."

"(9.) The delivery to the company of this debenture while unregistered . . . . shall be a good discharge for the principal moneys and interest thereby secured; and the company shall not be bound to inquire into the title of the bearer of such instrument, or to take notice of any trust affecting such money,

or be affected by express notice of the right, title, or claim of any other person to such money or instrument. . . .

"(10.) The company may at any time after the 1st of January, 1900, by notice given, in case of an unregistered debenture in the *Times* and one other London morning newspaper, and in the case of a registered debenture by a prepaid letter sent through the post to the registered holder, his executors or administrators, elect to redeem all or any of the then outstanding debentures; and, upon the expiration of six calendar months from such notice being given, the principal moneys secured shall become payable, together with a bonus or premium of 10*l.*

"(11.) The principal moneys hereby secured shall immediately become payable—(*a*) if the company makes default for a period of three calendar months in the payment of any interest hereby secured; (*b*) if an order is made or an effective resolution is passed for the winding up of the company otherwise than for purposes of reorganisation, reconstruction, or amalgamation."

The debentures had not been registered by the plaintiffs.

Evidence was called by the defendants to shew that similar debentures to bearer had been issued for many years by English trading companies, and that they had always been treated in mercantile practice as negotiable instruments passing by delivery from hand to hand. This evidence was objected to by the plaintiffs, but was received de bene esse by the learned judge.

Cohen, Q.C., and *J. A. Hamilton*, for the plaintiffs. These debentures are not negotiable instruments, and the defendants could acquire no title to them from Evans. They are not promissory notes, because there is no sum of money payable unconditionally at a certain time. They are debentures of an English company issued in England, and the case is, therefore, governed by the decision in *Crouch* v. *Crédit Foncier of England*. (1) It was there held that such debentures were not negotiable instruments, and, further, that it was not possible by modern usage to attach to such instruments the incident of negotiability contrary to the general law. This is an attempt

(1) L. R. 8 Q. B. 374.

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to make such debentures negotiable instruments contrary to the general law, and no evidence of usage, however universal, can be admitted for that purpose: *Edie* v. *East India Co.* (1) Even an express stipulation in a document that it is to be treated as a negotiable instrument is invalid as being against the general law: *Dixon* v. *Bovill.* (2)

The principles laid down in *Crouch* v. *Crédit Foncier of England* (3) are precise, and that decision has never been overruled. In *Goodwin* v. *Robarts* (4) the document in question was not a debenture, but scrip issued by the agent of a foreign government in England; and a similar document was the subject of the decision in *Rumball* v. *Metropolitan Bank.* (5) That, as the decision of a Divisional Court of the Queen's Bench Division, could not overrule *Crouch* v. *Crédit Foncier of England* (3) even if it purported to do so, which it does not. The real ground of the decision in *Rumball* v. *Metropolitan Bank* (5) was that of estoppel. In *London and County Banking Co.* v. *London and River Plate Bank* (6) Manisty J. expressly holds that *Crouch* v. *Crédit Foncier of England* (3) is not affected by *Goodwin* v. *Robarts.* (4) Though *London and County Banking Co.* v. *London and River Plate Bank* (6) went to the Court of Appeal (7), this point was not there dealt with. The plaintiffs are not estopped from denying the defendants' title. There was no negligence in entrusting the key of their safe to their secretary, and the cases as to estoppel are, therefore, distinguishable: *Swan* v. *North British Australasian Co.* (8); *Bank of Ireland* v. *Evans' Trustees* (9); *Arnold* v. *Cheque Bank* (10); *Mayor, &c., of the Staple* v. *Bank of England* (11); *Scholfield* v. *Earl of Londesborough.* (12)

[They also cited *Earl of Sheffield* v. *London Joint Stock Bank* (13); *Colonial Bank* v. *Cady* (14); *London Joint Stock*

(1) (1761) 2 Burr. 1216.
(2) (1856) 3 Macq. 1.
(3) L. R. 8 Q. B. 374.
(4) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.
(5) (1877) 2 Q. B. D. 194.
(6) (1887) 20 Q. B. D. 232.
(7) (1888) 21 Q. B. D. 535.
(8) (1863) 2 H. & C. 175.
(9) (1855) 5 H. L. C. 389.
(10) (1876) 1 C. P. D. 578.
(11) (1887) 21 Q. B. D. 160.
(12) [1896] A. C. 514.
(13) (1888) 13 App. Cas. 333.
(14) (1890) 15 App. Cas. 267.

Bank v. *Simmons* (1); *Fine Art Society* v. *Union Bank* (2); *Evans* v. *Hooper* (3); *Gray* v. *Pearson.* (4)]

Joseph Walton, Q.C., and *Scrutton*, for the defendants. These debentures are negotiable instruments transferable by delivery. The case is, therefore, governed by the decision in *Rumball* v. *Metropolitan Bank.* (5) The judgment in that case explained the decision of the Court of Exchequer Chamber in *Goodwin* v. *Robarts* (6), and shewed that the reasoning in *Crouch* v. *Crédit Foncier of England* (7) was wrong. Evidence of custom is, therefore, now admissible to shew that the incident of negotiability has been attached by usage in the mercantile world to documents other than bills of exchange and promissory notes. The law merchant consists of well-recognised and proved usage of the mercantile world, and it may alter the common law: *Shelden* v. *Hentley* (8); *Clerke* v. *Martin* (9); *Buller* v. *Crips.* (10) No doubt it must be shewn that the security, whether English or foreign, is treated as negotiable in England: *Picker* v. *London and County Bank.* (11)

In *London and County Bank* v. *London and River Plate Bank* (12) Manisty J. put a wrong interpretation on the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts.* (6) That decision is entirely incompatible with *Crouch* v. *Crédit Foncier of England* (7), and must be taken to have overruled it.

As to the question of estoppel, it was the duty of the plaintiffs to have registered these debentures, and as they did not do so they were guilty of negligence, and are, therefore, estopped from denying the defendants' title: *Pickard* v. *Sears* (13); *Goodwin* v. *Robarts* (14); *Rumball* v. *Metropolitan Bank.* (5)

J. A. Hamilton, in reply. The Exchequer Chamber, in *Goodwin* v. *Robarts* (6), did not overrule *Crouch* v. *Crédit Foncier of England.* (7) In *Goodwin* v. *Robarts* (14) the

(1) [1892] A. C. 201.
(2) (1886) 17 Q. B. D. 705.
(3) (1875) 1 Q. B. D. 45.
(4) (1870) L. R. 5 C. P. 568.
(5) 2 Q. B. D. 194.
(6) L. R. 10 Ex. 337.
(7) L. R. 8 Q. B. 374.
(8) (1682) 2 Show. 160.
(9) (1702) 2 Ld. Raym. 757.
(10) (1703) 6 Mod. 29.
(11) (1887) 18 Q. B. D. 515.
(12) 20 Q. B. D. 232.
(13) (1837) 6 A. & E. 469.
(14) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

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instrument before the Court was scrip of a foreign government; while in *Crouch* v. *Crédit Foncier of England* (1) the instrument was an English instrument, made by an English company in England. The cases are, therefore, distinguishable: see Smith's Leading Cases, 8th ed. vol. i. p. 537; Smith's Mercantile Law, 10th ed. vol. i. p. 218. *Rumball* v. *Metropolitan Bank* (2) is no authority, as it could not interpret the decision of the Exchequer Chamber as overruling *Crouch* v. *Crédit Foncier of England* (1), and it was mainly decided on the question of estoppel.

All the cases were decided on special cases stated for the Court, and this is the first time that the Court has had to deal with actual evidence of the alleged usage.

Cur. adv. vult.

Aug. 10. KENNEDY J. read the following judgment:—In this case the plaintiffs claim in form from the defendants the return of twenty 6 per cent. debentures of the Beira Junction Railway, Limited, Nos. 427 to 446 inclusive, or their value and damages for the detention; or, alternatively, damages for the wrongful conversion of the debentures. Really, the claim has become a claim for the value of the debentures, which have been sold, less a sum of 153*l.* 3*s.* 3*d.*, which has been either handed over to the plaintiffs, or is at their disposal, and nominal damages for a detention or conversion.

The history of the claim may be stated in a very few words. The plaintiffs had a secretary of the name of Evans, now deceased. The debentures in question were kept in the plaintiffs' safe in their office. Evans had the key of the safe. He dishonestly pledged them with the defendants as a security for advances made to him by the defendants. The defendants took the debentures from Evans in perfectly good faith. Indeed, some time previously, in answer to an inquiry of the defendants as to Evans's right to deposit certain shares in the plaintiff company against advances, the defendants had received from the chairman of the plaintiff company a written testimonial to Evans's extremely honest character and straightforwardness in

(1) L. R. 8 Q. B. 374. (2) 2 Q. B. D. 194.

everything. The main issue, and, in my view, really the sole issue, in the case is whether these debentures ought or ought not to be treated as negotiable instruments so as to give the defendants, who became bonâ fide holders for valuable consideration, a good title to the extent of their advances to Evans upon the debentures as against the plaintiffs, who claim to recover the property of which Evans fraudulently deprived them. The debentures are, according to their tenour, payable to bearer, or, when registered, to the registered holder for the time being on presentation of the debenture. Indorsed upon each of them are several printed conditions. The third, fourth, fifth, and sixth of the conditions are in substance as follows: "(3.) Except when registered this debenture is transferable by delivery, but the company will at any time, upon the request of the bearer whilst unregistered, register him and his nominee in the register below mentioned as the holder of this debenture, and indorse a note of such registration thereon, and the company will also at any time, upon the request in writing of the registered holder, his executors or administrators, cancel the registration and the note thereof indorsed thereon, and thereupon this debenture will again become transferable by delivery." The fourth condition provides for the register, and the fifth for the registration of debenture-holders therein. Under the sixth condition every transfer of the debenture when registered is to be in writing under the hand of the registered holder or his legal personal representative, and before registration of the transfer proof must be given to the company of the title and identity of the transferee. The eleventh condition provides that the principal moneys shall immediately become payable if a certain default is made in due payment of interest, or a winding-up order is made, or a resolution is passed otherwise than for purposes of reorganization, reconstruction, or amalgamation.

Now, it is, I think, unquestionable, and it was not disputed at the bar, that such a debenture as this, if viewed according to its tenour merely and without regard to mercantile usage, does not belong to the class of negotiable instruments which the law has recognised as such, by virtue either of the ancient

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law merchant or by virtue of statute (such as bills of exchange, promissory notes, and Exchequer bills), and the delivery of which confers a good title to the person who acquires them in good faith and for value, notwithstanding a defect in the title of the transferor. It is most like a promissory note payable to bearer; but it is prevented from ranking as such by its conditions. Evidence, however, was adduced by the defendants of a usage of the mercantile world in recent times to treat "debentures to bearer" of this kind as negotiable instruments; and the defendants contend that if I am of opinion that the usage has been proved I ought to recognise and give effect to it by upholding their title to these debentures. The plaintiffs contend that the usage has not been proved; they further contend, as a matter of law, that evidence of it was not properly receivable; that, even if the custom was proved, it cannot, being of recent introduction, be treated as part of that law merchant which Courts of Justice are bound to know and recognise. There are, therefore, to be decided two distinct questions—the first of fact; the second of law. Is there a usage of the mercantile world to treat such debentures as negotiable instruments, passing like promissory notes or bank-notes by mere delivery from hand to hand accordingly? If there is such a usage, ought it in a court of law to have the effect of attaching the quality or incident of negotiability to the contract contained in the debenture, so that the property in that chattel and all rights upon it may, upon delivery of it, be acquired by a person who is not the owner?

Upon the question of fact, I am of opinion that the defendants have sufficiently proved the usage of merchants which they sought to establish. I had before me as witnesses Mr. Grosvenor, manager of the loans and securities department of the London and Joint Stock Bank, with thirty-five years' experience; Mr. Rutherford, who for twenty-three years has had similar duties in the City Bank; Mr. Stone, secretary of the National Bank, with twenty-six years' experience; and Mr. Satterthwaite, the secretary of the London Stock Exchange. The plaintiffs, as I understood from counsel, had intimated to the defendants that they should not comment upon the fact, if

no larger number of witnesses were called to prove the usage, and they themselves called no evidence to disprove the existence of the usage. Looking at a long list of companies issuing debentures to bearer, which by the consent of the parties was handed up to me, and the catalogue of bankers given at p. 756 of Mr. Palmer's work on Company Precedents (7th ed.), I cannot suppose that there would have been any difficulty in adding largely to the number of witnesses had the defendants sought to do so. So far as the fact of the usage is concerned, the plaintiffs themselves appear to have believed in its existence. They had claimed from underwriters on an insurance on Evans's fidelity in respect of the loss caused to them by his dishonest dealing with these debentures, and, in their written reply to the question of the underwriters whether these debentures were in such a form as to be negotiable instruments, they had in writing stated, "Yes, bearer."

The effect of the evidence as a whole was, in my view, that such debentures as these had for many years past been issued by English trading companies and circulated in the mercantile world as negotiable instruments passing from hand to hand accordingly. The length of time over which the circulation of debentures to bearer had been going on was not exactly stated by the witnesses. Mr. Grosvenor spoke of fifteen years' knowledge; Mr. Satterthwaite said that large numbers were modern —that is, current during the last ten years—but some he believed to be of very old date. All appeared to agree in substance that they have always been treated in mercantile practice since their circulation as negotiable instruments passing by delivery as such. Taking the evidence as a whole, I have come, as I have already said, to the conclusion that I ought to be satisfied with the defendants' proof of mercantile usage, both in point of extent and in point of duration. Indeed, in respect of duration, I am led by what appears in the report of *Crouch* v. *Crédit Foncier of England* (1)—a case upon which, in regard to the point of law, the plaintiffs mainly rely—to infer that the time during which it has been the mercantile practice to treat these debentures to bearer as negotiable instruments

(1) L. R. 8 Q. B. 374.

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really exceeds the time which appears from the oral evidence adduced before me by the defendants. The debenture in the case referred to was issued by an English trading company in 1869—that is, nearly thirty years ago. In the judgment pronounced by Blackburn J. as the judgment of the Court (1) occurs the following passage as to mercantile usage then in regard to such instruments: "No evidence was given at the trial as to whether similar documents are in practice treated as negotiable, nor was any express admission made as to this point; but from my brother Bramwell's report we think that we must take it to have been tacitly admitted at the trial that they are so treated, and we must in this case assume that this admission is correct. As instruments of this kind have only come into use within the last few years, a custom or usage to treat them as negotiable can only have begun recently; but we must in deciding this case proceed on the assumption that they have acquired whatever degree of negotiability can be created by any such recent custom of trade. As we proceed entirely on this admission, it is not to be taken in any future case that any custom was in this case established."

Assuming the usage (or custom) proved in the present case, I have to say whether, in my judgment, I ought to give effect to it. The plaintiffs contend that I ought not to do so, and that evidence to prove it was not admissible. As to the admission of evidence, if the grounds (which I proceed to consider) of the plaintiffs' contention as to the absolute incapacity of modern mercantile usage to obtain legal ratification in respect to the negotiability of instruments issued in England by an English company, and not recognised as negotiable by the ancient mercantile law, and not made such by statute, are good, it follows, I agree, that evidence of such a modern mercantile usage is irrelevant, and, therefore, inadmissible. The objection to the effect of the usage, if proved, and the objection to the reception of evidence to prove the usage, stand or fall together.

The contention of the plaintiffs rests upon the reasoning of the considered judgment of the Court of Queen's Bench (Black-

(1) L. R. 8 Q. B. at p. 380.

burn, Quain, and Archibald JJ., delivered by Blackburn J.) in *Crouch* v. *Crédit Foncier of England.* (1) The nature of the document which was there in question was practically identical with that of the debentures in the present case. The defendants were the company who issued the debenture. The plaintiff had in good faith and for value bought the debenture from a thief, and sued the defendants for payment of the amount due upon the debenture. The Court held that the defendants were entitled to succeed. It was held that the contract contained in the conditions prevented the debenture from being a promissory note, and that it was not competent to the defendants to attach the incident of negotiability to such instruments contrary to the general law, and that the custom to treat them as negotiable being of recent origin, and not the law merchant, made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law.

It appears to me that, if the decision upon these grounds still correctly represents the law, it entitles the plaintiffs in the present action to my judgment. Unless its reasoning has been authoritatively disapproved by more recent decision, I am bound by this judgment of the Court of Queen's Bench. The defendants assert that the judgment, so far as it rests upon this reasoning, has been authoritatively disapproved, although it may be that the decision may be justified upon a ground suggested in the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (2), to which I shall have hereinafter to refer. The matter is one of commercial importance and, in my view, of considerable legal difficulty. It becomes, therefore, right and necessary for me to consider closely the reasoning both of Blackburn J.'s judgment and that of the learned judges in certain later cases. This is not a case in which it would serve any useful purpose to stay to discuss the principle apart from the reported decisions. All that can be argued is to be found in these cases in the judgments of most eminent authorities.

The judgment of the Queen's Bench in *Crouch* v. *Crédit*

(1) L. R. 8 Q. B. 374. (2) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

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Foncier of England (1) is carefully confined to the case of an English instrument made in England by an English company. It treats as distinguishable the case of bonds of foreign and colonial governments, such as had been held to be negotiable in *Gorgier* v. *Mieville* (2), upon which, says the learned judge, "we have no intention to throw the least doubt"; and he proceeds: "We express no opinion as to what might be the law as to obligations made by subjects abroad, which by the law of the country where they were made, are negotiable in that country." Dealing, therefore, only with the debentures of an English company made in England, Blackburn J. sets forth the reasons for the decision of the Court so far as relates to the effect of an assumed mercantile usage of recent date to treat them as negotiable instruments. His reasoning sufficiently appears, I think, in the two following passages (3): "There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract. It is enough to refer to *Dixon* v. *Bovill* (4) and *Thompson* v. *Dominy* (5) as authorities that he cannot irrespective of custom so create it. We have only further to consider whether the custom or practice of trade to treat such instruments as negotiable makes any difference. We must take it as admitted (whether truly or not we know not) that such a custom has prevailed of late years; but as the instruments themselves are only of recent introduction, it can be no part of the law merchant. Incidents which the parties are competent by express stipulation to introduce into their contracts, may be annexed by custom, however recent, provided that it be general, on the ground that they are tacitly incorporated in the contract. If the wording of an instrument is such as to exclude this tacit incorporation, no usage can annex the incident. But where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the tacit stipulation arising from usage. It may be so annexed by the ancient

(1) L. R. 8 Q. B. 374.
(2) (1824) 3 B. & C. 45.
(3) L. R. 8 Q. B. at p. 386.
(4) 3 Macq. 1.
(5) (1845) 14 M. & W. 403.

law merchant, which forms part of the law, and of which the Courts take notice. Nor if the ancient law merchant annexes the incident, can any modern usage take it away." Then he continues (1): "We have already intimated our opinion that it is beyond the competency of the parties to a contract by express words to confer on the assignee of that contract a right to sue in his own name. And we also think it beyond the competency of the parties by express stipulation to deprive the assignee of either the contract or the property represented by it, of his right to take back his property from any one to whom a thief may have transferred it, even though that transferee took it bonâ fide and for value. As these stipulations, if express, would have been ineffectual, the tacit stipulations implied from custom must be equally ineffectual."

The propositions of law which are involved in this judgment may be summarised thus: 1. The general rule of law is that a chose in action cannot be transferred at law at all, and parties cannot merely by their own act annex to a contract the incidents of negotiability—that is to say, a right of action thereon, in the holder for the time being in his own name, and a title both to the document containing the contract and to all rights under the contract, irrespective of defect in title of the person from whom the holder acquired it. 2. Such incidents can be annexed to a contract only by virtue either of statute or of the ancient usage of merchants which has been adopted by and now forms part of the law. 3. The modern usage of merchants cannot annex such incidents to a contract if the instrument containing it be made by an English company in England, and does not come within the category of negotiable instruments created by statute or adopted by the common law from the "ancient law merchant." 4. The modern usage of merchants may annex the character of negotiability to bonds and like instruments of a foreign or colonial government. The correctness of the second and third propositions appears to me to be essential to the validity of the judgment, and essential also to the success of the plaintiffs' case in this action.

So far as I am aware, there was no appeal against the

(1) L. R. 8 Q. B. at p. 387.

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judgment; but in 1875, two years later, came the case of *Goodwin* v. *Robarts* (1), which was first argued on a special case in the Court of Exchequer, and was taken on appeal first to the Exchequer Chamber, and afterwards to the House of Lords.

In *Goodwin* v. *Robarts* (1) the document consisted of scrip issued in England by the agent of a foreign government. This scrip, which entitled the holder on payment of certain instalments to delivery by the agent of bonds of the foreign government, was placed by the plaintiff in the hands of his broker to be dealt with as the plaintiff might direct. The broker dishonestly pledged it with the defendants, who acted in good faith, to secure a loan made by them to him. The special case contained a lengthy statement of the facts as to the negotiability of the scrip—as to such scrip being well known to and largely dealt in by bankers, money-dealers, and the Stock Exchange for above fifty years, and as to the custom of treating such scrip as a negotiable instrument transferable by delivery. The Court of Exchequer gave judgment for the defendant, and this judgment was upheld both in the Exchequer Chamber and in the House of Lords. With regard to the Court of Exchequer, it is only needful to say that it held that the case was undistinguishable from *Gorgier* v. *Mieville* (2), and that the Court could follow that case without affecting the decision in *Crouch* v. *Crédit Foncier of England* (3), stress being laid upon the fact that the scrip in this case was the scrip of a foreign government.

In the Exchequer Chamber the considered judgment of the Court was delivered by Cockburn C.J., the other members of the Court being Mellor and Lush JJ., the late Master of the Rolls (then Brett J.), and the present Master of the Rolls (then Lindley J.). Mr. Benjamin, counsel for the appellant, had much relied upon the judgment in *Crouch* v. *Crédit Foncier of England*. (3) At page 343 his argument, based in large measure at least upon the judgment in that case, is recited at some length by the Chief Justice, and it is thus summarised (4):

(1) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.
(2) 3 B. & C. 45.
(3) L. R. 8 Q. B. 374.
(4) L. R. 10 Ex. at p. 346.

"The substance of Mr. Benjamin's argument is that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which by the law merchant, the character of negotiability can attach." The judgment then, in a most instructive and interesting passage, proceeds to give an exhaustive review of the history of our law in regard to negotiable instruments, and to shew that the argument that mercantile usage cannot now avail to gain recognition from the law in attaching to mercantile documents the incident of negotiability is not founded on a right understanding of that legal history, or upon sound legal principle. It states in emphatic terms the dissent of the Exchequer Chamber from the view that the law merchant is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the requirements of trade in the varying circumstances of commerce. It quotes with approval the language of Lord Campbell in *Brandao* v. *Barnett* (1), that when a general usage has been judicially ascertained and established it becomes a part of the law merchant which Courts of Justice are bound to know and recognise. At p. 355 the judgment deals particularly and directly with the case of *Crouch* v. *Crédit Foncier of England.* (2) After stating the material facts of that case, the judgment thus proceeds: "It was there held by three judges of the Court of Queen's Bench that the plaintiff could not recover, first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom to whatever extent it

(1) (1846) 12 Cl. & F. 787, at p. 805. (2) L. R. 8 Q. B. 374.

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had gone must also have been quite recent. Under these circumstances the Court held that, while it was incompetent to the defendants, as an individual company, to give that which was not a negotiable instrument at law the character of negotiability by making it payable to bearer, the custom could not have that effect because being recent it formed no part of the ancient law merchant. For the reasons we have already given, we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shewn to be universal it is the less entitled to prevail because it may not have formed part of the law merchant as previously recognised and adopted by the Courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds which are of comparatively modern origin, and yet, according to *Gorgier* v. *Mieville* (1), are to be treated as negotiable. We think the judgment in *Crouch* v. *Crédit Foncier of England* (2) may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established it would have been a sufficient ground for refusing to give effect to it, that it did not form part of what is called 'the ancient law merchant.'" At the close of the judgment the Court of Exchequer Chamber distinguished the class of cases to which Blackburn J. had referred in *Crouch* v. *Crédit Foncier of England* (2), and which were cited to me by Mr. Cohen in the present case, and of which *Edie* v. *East India Co.* (3) is an example. As I understand the reasoning of this part of the judgment of the Exchequer Chamber, the distinction is that those are not cases in which it is sought (as it is here, and was in *Goodwin* v. *Robarts* (4)) by virtue of mercantile usage to annex the incident of negotiability to instruments purporting on the face of them to be negotiable, but not previously recognised by the Courts—or, in other words, simply to enlarge the category of negotiable instruments. They were

(1) 3 B. & C. 45.
(2) L. R. 8 Q. B. 374.
(3) 2 Burr. 1216.
(4) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

cases in which it was sought to do what the judgment of the Exchequer Chamber lays down to be clearly not permissible—namely, to set up a mercantile usage which involved a defiance or disregard of positive or settled law, including in the term "law" such usages as, having been made the subject of legal decision and having been sanctioned by the Courts, have become by such adoption part of the common law. Thus (to take an example from one of the cases cited in the judgment), no evidence of contrary usage would be permissible in the case of a promissory note to shew that it is not negotiable: see *Grant* v. *Vaughan.* (1)

The judgment of the Exchequer Chamber was affirmed and the ratio decidendi approved in the House of Lords. The House of Lords decided also that the plaintiffs were entitled to succeed upon another ground—the ground of estoppel.

It appears to me that upon the vital question of the effect of modern mercantile usage, such as, I think, has been sufficiently proved in the present case, it is impossible to treat the reasoning of the Court of Queen's Bench in *Crouch* v. *Crédit Foncier of England* (2) and the reasoning of the Exchequer Chamber in *Goodwin* v. *Robarts* (3) as capable of reconciliation. I read the judgment of the Exchequer Chamber in the later case as plainly disapproving of the reasoning of the judgment in the earlier case. It cannot, I think, be maintained that the judgment in *Goodwin* v. *Robarts* (3) upon this question of the effect of modern mercantile usage was unnecessary to the decision; nor, I think, can it be maintained that the two judgments are capable of reconciliation upon the ground that the instrument in question in the earlier case was an English instrument, and the instrument in question in the latter case was, though issued by a London agent, to all intents and purposes the scrip of a foreign government. In the first place, not only is there no hint in the judgment of the Exchequer Chamber, so far as it deals with the effect of modern mercantile usage, of an intention to confine it to the case of the scrip issued by a foreign government, or to exclude from the operative

(1) (1764) 3 Burr. 1516. (2) L. R. 8 Q. B. 374.
(3) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

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effect of modern mercantile usage an English instrument; but the Court of Exchequer Chamber prefaces this portion of the judgment by saying (1): "We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract." In the second place, it seems to me to be impossible to suppose that, if *Crouch* v. *Crédit Foncier of England* (2) was thought by the Exchequer Chamber to be distinguishable and capable of support on so clear and definite a ground as this would be, their judgment would (as the only ground of support for the decision in that case) have expressly stated (3) that it might well be supported on the ground that in that case there was substantially no proof whatever of general usage—a suggestion which, with all respect, having in view the assumption by the Court of Queen's Bench of the existence of a general usage (as stated in L. R. 8 Q. B. at p. 380), I must confess that I do not find it easy to follow. In the third place, I think that both upon principle and upon authority, whether the instrument in question be an English instrument or a foreign instrument, the usage necessary to support its claim to rank as negotiable must be in either case a usage in England. In the later case of *Picker* v. *London and County Banking Co.* (4) Lord Esher M.R. stated that in order to establish such an exception to the common law rule some custom of merchants obtaining in this country must be proved, or some English statute must be relied on. "To prove that an instrument is negotiable in the sense required there must be something to make it so by English law" (5); and Bowen L.J. (6) uses language to the like effect. Lastly, in the case of *Rumball* v. *Metropolitan Bank* (7), a Divisional Court of the Queen's Bench Division in the year 1877 treated *Goodwin* v. *Robarts* (8) as decisive of an action in which a similar question arose upon an English instrument (a scrip certificate to bearer issued by an English joint stock com-

(1) L. R. 10 Ex. at p. 345.
(2) L. R. 8 Q. B. 374.
(3) L. R. 10 Ex. at p. 356.
(4) 18 Q. B. D. 515.
(5) 18 Q. B. D. at p. 518.
(6) 18 Q. B. D. at pp. 519, 520.
(7) 2 Q. B. D. 194.
(8) L. R. 10 Ex. 76, 337; 1 App. Cas. 476.

pany). The case was argued upon a special case. The case stated a usage among bankers, discounters, money-dealers, and on the Stock Exchange for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery. The Court, it may be noted, consisted of Cockburn C.J. and Mellor J., the former being the judge who had delivered the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (1), and the other one of the judges who took part in the decision of that case. It is impossible to suppose that they were not fully aware of all that could possibly be held to distinguish (if anything could) the two decisions, and *Crouch* v. *Crédit Foncier of England* (2) was cited to them in argument. But in their considered judgment they held the matter of the effect of the usage in conferring negotiability upon an English instrument, although not negotiable either by statute or by the "ancient mercantile law," as settled by the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (1); whilst they also held, upon the facts in the case before them, that the second ground of decision adopted by the House of Lords in *Goodwin* v. *Robarts* (3)—the ground of estoppel—applied to the case before them. The judgment was delivered by Mellor J., and at the close of it (4) he said: "The present case appears to us to come within both these decisions" (i.e., the decision of the Exchequer Chamber and the decision of the House of Lords in *Goodwin* v. *Robarts* (1))—"as regards the usage, within the principle of the decision of the Court of Exchequer Chamber; as regards the applicability of the doctrine of *Pickard* v. *Sears* (5), within the second ground of the decision adopted by the House of Lords."

There is, I think, only one other case bearing upon the question I have been considering to which I need (though very briefly) to make a reference. That is the case, decided by Manisty J. in 1887, of the *London and County Banking Co.* v. *London and River Plate Bank.* (6) It has upon its facts no real bearing, I think, upon the present case, as the document

(1) L. R. 10 Ex. 337.
(2) L. R. 8 Q. B. 374.
(3) 1 App. Cas. 476.
(4) 2 Q. B. D. at p. 198.
(5) 6 A. & E. 469.
(6) 20 Q. B. D. 232.

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which formed the matter of inquiry was a share certificate which was on the face of it intended to pass by transfer only, and not by mere delivery. The judgment, however, was cited to me by Mr. Cohen as shewing—and I think that it does shew—that Manisty J. considered the ratio decidendi in *Crouch* v. *Crédit Foncier of England* (1) to be still good in law. With the utmost respect, for the reasons given, I cannot concur in that opinion, and I cannot help venturing to think, from his reference to the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* (2), if the learned judge is correctly reported, that there may have been some misapprehension. For in the first place he is reported as saying that *Crouch* v. *Crédit Foncier of England* (1) had been the subject of comment by the late Lord Chief Justice Cockburn in *Goodwin* v. *Robarts* (2), whereas both in fact and in form the judgment is the judgment of the Exchequer Chamber; and he proceeds to say that the case was decided upon the doctrine of estoppel. As has been already stated, the doctrine of estoppel formed no part of the judgment of the Exchequer Chamber: the doctrine of estoppel was first applied by the House of Lords, not as a substituted, but as an additional ground of judgment.

It appears to me that, having regard to the decisions of the Exchequer Chamber in *Goodwin* v. *Robarts* (2) and of the Queen's Bench Division in *Rumball* v. *Metropolitan Bank* (3), if I have come, as I have, to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions; and these decisions, for the reasons which I have felt myself bound to state at length, appear to me practically to overrule the decision in *Crouch* v. *Crédit Foncier of England* (1), and to govern this case.

There is one other and distinct point which was taken before me by the defendants as to which I must say a few words. It is a contention based upon the second ground of the decision of the House of Lords in *Goodwin* v. *Robarts* (4)—the ground

(1) L. R. 8 Q. B. 374.
(2) L. R. 10 Ex. 337.
(3) 2 Q. B. D. 194.
(4) 1 App. Cas. 476.

of estoppel. It is said that the plaintiffs so acted in leaving these documents, treated by merchants as negotiable, in a safe at the office of the company to which their secretary, Evans, had access by his possession of the key, that they are not entitled to recover from those to whom Evans dishonestly delivered the documents. I am wholly unable to accept this argument. I see no negligence or any conduct raising an estoppel in what the plaintiffs did. They are a limited company. Some person (be he a director, or a servant, or an agent) must at times at least be entrusted with the charge of this property; and it would be in ordinary course, I should suppose, that the care of the safe and the key of the safe should be entrusted by the plaintiff company to their secretary, whom they had no reason to distrust. In my judgment, the state of facts here cannot be treated as equivalent in its legal bearing to the state of facts in *Goodwin* v. *Robarts* (1), where the owner placed the documents in the hands of a broker to deal with them as the owner might afterwards direct him. If there were no difference in the facts, I should of course simply follow the decision of the House of Lords, which is absolutely binding. But, as I have said, to apply the doctrine of estoppel to the present state of facts would be in my judgment to go beyond anything which the judgment of the House of Lords in *Goodwin* v. *Robarts* (1) could justify. Even in regard to the facts in that case, Lord Bramwell, in the case of the *Colonial Bank* v. *Cady* (2), has stated that, with all respect to Lord Cairns, he could not see any ground for applying the doctrine of *Pickard* v. *Sears* (3) in *Goodwin* v. *Robarts*. (1)

I give judgment for the defendants with costs.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Clapham, Fitch & Co.*

(1) 1 App. Cas. 476. (2) 15 App. Cas. 267, at p. 282.
(3) 6 A. & E. 469.

A. P. P. K.

C. A.
1898
Oct. 31.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF F. H. SKINNER *v.* THE COUNTY COURT JUDGE OF NORTHALLERTON.

County Court—Bankruptcy—Debtor—Absconding before Presentation of Petition—Arrest—Order made in Exercise of Bankruptcy Jurisdiction—Certiorari—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 25, *sub-s.* 1 (*a*) *—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 7.

A writ of certiorari cannot be issued to bring up an order of a county court judge made when exercising bankruptcy jurisdiction.

The power given by the Bankruptcy Act, 1883, s. 25, sub-s. 1 (*a*), as amended by the Bankruptcy Act, 1890, s. 7, to grant a warrant, under certain circumstances, for the arrest of a debtor "who has absconded or is about to abscond," is not limited as to time, and applies to the case of a debtor absconding before a bankruptcy notice has been issued or a bankruptcy petition presented.

APPEAL from a judgment of the Queen's Bench Division discharging a rule nisi for the issue of a writ of certiorari to bring up an order of the county court judge at Northallerton sitting in Bankruptcy.

A petition in bankruptcy against the prosecutor Skinner was presented in the county court at Northallerton, and evidence was given that before the presentation of the petition Skinner had departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts. The county court judge thereupon made an order for the issue of a warrant for the arrest of Skinner under s. 25, sub-s. 1 (*a*), of the Bankruptcy Act, 1883. The warrant issued in pursuance of this order recited that by evidence taken on oath it had been made to appear to the satisfaction of the Court that there was probable reason to suspect and believe that Skinner was avoiding examination in respect of his affairs, and was otherwise delaying or embarrassing proceedings in bankruptcy against him. Skinner was arrested under this warrant, and subsequently discharged. A rule nisi was obtained for a certiorari

to bring up the order, and this rule was subsequently discharged by the Court (Wright and Darling JJ.).

Skinner appealed.

Aug. 10. *R. G. Glenn* and *Horridge*, in support of the appeal. There was no evidence that the debtor had absconded; but even if there had been such evidence, it would have related to his going away before the presentation of a bankruptcy petition against him, and the Bankruptcy Act, 1883, s. 25, sub-s. 1 (*a*), deals with such action on his part only after notice or petition. (1)

The warrant is bad on the face of it, as it says nothing about absconding, and the legality of the imprisonment must depend on the legality of the warrant: *Lindsay* v. *Leigh* (2); *Ex parte Austin*. (3)

Where there is a total absence of jurisdiction a statute taking away the certiorari does not apply: *Ex parte Bradlaugh* (4); *Colonial Bank of Australasia* v. *Willan*. (5) The fact that the warrant is bad on the face of it distinguishes this case from *In re New Par Consols* (*No.* 2) (6), where prohibition was refused.

Certiorari goes to bring up an order of a county court judge as in *Cobbold* v. *Pryke* (7), and to the Admiralty Court, although

(1) 46 & 47 Vict. c. 52, s. 25, sub-s. 1: "The Court may by warrant .... cause a debtor to be arrested .... (*a*.) If after a bankruptcy notice has been issued under this Act, or after presentation of a bankruptcy petition by or against him, it appears to the Court that there is probable reason for believing that he is about to abscond with a view of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him."

By 53 & 54 Vict. c. 71, s. 7, Sect. 25 of the principal Act (relating to the arrest of a debtor under certain circumstances) shall be read and construed as if the words "believing that he has absconded, or is about to abscond," were substituted for the words "believing that he is about to abscond."

(2) (1848) 17 L. J. (M.C.) 50.
(3) (1880) 50 L. J. (M.C.) 8.
(4) (1878) 3 Q. B. D. 509.
(5) (1874) L. R. 5 P. C. 417.
(6) [1898] 1 Q. B. 669.
(7) (1879) 4 Ex. D. 315.

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SKINNER v. COUNTY COURT JUDGE OF NORTH-ALLERTON.

it is a superior court: *James* v. *London and South Western Ry.* (1)

Sir R. B. Finlay, S.-G., and *Muir Mackenzie*, for the defendant. The power to issue a warrant for the arrest of a debtor can only be exercised after the issue of a bankruptcy notice or the presentation of a petition, but it is not dependent on whether the debtor has absconded before or after either of those events. This is not a case in which there is no jurisdiction, for the effect of ss. 92 sub-s. 1, 93 sub-s. 1, 100, and 102 sub-s. 2, of the Bankruptcy Act, 1883, is to give the county court the complete jurisdiction of the High Court, so that even if the order and the warrant were wrong the remedy would not be by certiorari, but by application to the county court or by appeal.

R. G. Glenn, in reply.

Cur. adv. vult.

Oct. 31. A. L. SMITH L.J. read the following judgment:— The question in the case is whether the Divisional Court was right in refusing a certiorari to bring up to be quashed an order for the issue of a warrant of arrest under which the applicant Skinner had been arrested and subsequently discharged. I agree with what my brother Wright said as to the inutility of the application, for Skinner long before the motion was made on his behalf had been discharged from custody; but as the point is brought up here on appeal and stoutly argued for the applicant, it must be determined.

Skinner is a solicitor, and in the month of April, 1898, he was in embarrassed circumstances, and upon the 12th of the month he left his home.

His uncle gave evidence, which was before the learned county court judge, that Skinner was upon April 12 hopelessly insolvent; that his creditors were pressing him; that the uncle believed that Skinner had departed from his dwelling-house for the purpose of delaying his creditors and escaping payment of his debts. This and other like evidence being before the county

(1) (1872) 41 L. J. (Ex.) 82.

court judge sitting in Bankruptcy, he had ample evidence upon which to find, as he did, that Skinner had absconded, which gave him jurisdiction to order the issue of a warrant of arrest of the debtor under s. 25, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, as amended by s. 7 of the Bankruptcy Act, 1890, assuming those sections taken together have not the limitation now contended for on behalf of the applicant.

It is said that these sections gave no jurisdiction to the learned county court judge to order the issue of a warrant, firstly, because there was no evidence to give ground for believing that Skinner had absconded, or was about to abscond, with a view of avoiding payment of his debts—but this point is wholly untenable in fact—and, secondly, because the county court judge sitting in Bankruptcy could only order the issue of a warrant of arrest if a debtor has absconded or is about to abscond after a bankruptcy notice had been issued, or after presentation of a bankruptcy petition, and that as Skinner left his home before either the one or the other, his arrest was ordered without jurisdiction. In my judgment, s. 7 of the Bankruptcy Act, 1890, was enacted by way of amendment to s. 25, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, to meet this point. Sect. 25, sub-s. 1 (*a*), of the Bankruptcy Act, 1883, coupled with s. 7 of the Act of 1890, reads thus: "If after a bankruptcy notice has been issued under this Act, or after the presentation of a bankruptcy petition, it appears to the Court that there is probable reason for believing that the debtor has absconded or is about to abscond . . . ." then a warrant may be granted. The words "has absconded," when taken in conjunction with "about to abscond," are, in my judgment, without limitation as to time, and mean has absconded before, or is about to abscond after, the notice or petition; and, indeed, what good reason is there to induce the Court to hold that there is no jurisdiction to order the issue of a warrant if the debtor has absconded the day before the notice or petition, whereas there is jurisdiction if he absconds or is about to abscond the day after? I see no sense in this; and, in my judgment, the Solicitor-General is right upon his construction of these two sections taken together.

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A third point was then taken for the applicant, and it was said that the warrant was bad upon its face, because it did not shew the offence committed by the debtor. Be it so. But the county court judge was sitting in Bankruptcy when he made the order for the issue of the warrant, and this is beyond dispute. Now, what is his jurisdiction when sitting in Bankruptcy?

By s. 92, sub-s. 1, of the Bankruptcy Act, 1883, it is enacted that "The Courts having jurisdiction in Bankruptcy shall be the High Court and the county courts." By s. 93, sub-s. 1, it is enacted: "From and after the commencement of this Act the London Bankruptcy Court shall be united and consolidated with and form part of the Supreme Court of Judicature, and the jurisdiction of the London Bankruptcy Court shall be transferred to the High Court." By s. 100, "A county court shall, for the purposes of its Bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly in manner prescribed." By s. 102, sub-s. 2, "A Court having jurisdiction in Bankruptcy under this Act shall not be subject to be restrained in the execution of its powers under this Act by the order of any other Court, nor shall any appeal lie from its decisions except in manner directed by this Act." And by s. 104, sub-s. 1, "Every Court having jurisdiction in Bankruptcy under this Act may review, rescind, or vary any order made by it under its Bankruptcy jurisdiction."

In my judgment, the result of these sections is that the position of a county court judge sitting in Bankruptcy and exercising bankruptcy jurisdiction, and acting within that jurisdiction, is a position similar to that of a judge of the High Court exercising his jurisdiction, and that so long as a county court judge is exercising bankruptcy jurisdiction the remedy by which to question an order made by such a judge, when exercising such jurisdiction, if such order requires alteration or amendment, is by application to the judge himself sitting in Bankruptcy, and then possibly by appeal, and not by certiorari to bring up the order into the Queen's Bench Division. This

is the procedure which this Court held in *In re New Par Consols* (*No.* 2) (1) to be the proper procedure under sections in the Winding-up Acts, which as to this are equivalent to s. 100 in the Bankruptcy Act, 1883.

The present case appears to me to be a stronger case than *In re New Par Consols* (*No.* 2) (1), and for the reasons above given I think that the appeal should be dismissed.

RIGBY L.J. I agree in the conclusion and reasoning of the Lord Justice.

VAUGHAN WILLIAMS L.J. read the following judgment:— Having regard to the decision of the Court of Appeal in the case of *In re New Par Consols* (*No.* 2) (1), a decision which binds this Court, I do not see how it can possibly be said that the order of the county court judge can be made the subject of a writ of certiorari by the Queen's Bench Division, and I think, therefore, that this appeal must be dismissed. In that case it was held by the Court of Appeal that, inasmuch as a county court judge had jurisdiction to wind up the company, and had for the purposes of that jurisdiction all the powers of the High Court, and was therefore, for that purpose, placed on an equal footing with the judge of the High Court, the prohibition would not lie; and I agree with A. L. Smith L.J. that on the principle of that decision a writ of certiorari cannot be issued to bring up the order of the county court judge exercising jurisdiction in Bankruptcy, and I think such an order could not be brought up even though the county court judge might have misconstrued the section under which he purported to issue the warrant in question, or even though the warrant in question might have been bad on the face of it, as being based ex facie and by its terms on facts which under the Bankruptcy Act would not have justified the issue of the warrant of arrest, or had been based upon affidavits which did not disclose any conduct of the debtor justifying the arrest. It is sufficient to say that the Queen's Bench Division has no power to prohibit a judge of the High Court or to issue a certiorari to bring up

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his order, nor, according to the decision in *In re New Par Consols* (*No.* 2) (1), to prohibit the county court judge or bring up his order in a matter in respect of which he is by statute invested with the powers of the High Court, and therefore placed on an equal footing with a judge of the High Court.

The cases in which a certiorari has gone to bring up the order of an inferior court exceeding its jurisdiction, even where a certiorari has been taken away by statute, do not seem to me to touch the present case, because the basis of the decision in *In re New Par Consols* (*No.* 2) (1) was that the judge of the county court exercising jurisdiction in a matter in which the statute gave him seisin was not an inferior court, because in such a matter the statute gave him all the powers of a judge of the High Court.

This being so, it is not necessary for me to express any opinion on the decision which binds me, or upon any of the contentions impeaching the orders of arrest to which I have referred, or as to how far the issue of the writ is discretionary.

A judge of the High Court in the exercise of his jurisdiction cannot be controlled by writs of prohibition or certiorari, but only by appeal; and if the county court judge in the exercise of bankruptcy jurisdiction is, as would seem to be the case from the decision in *In re New Par Consols* (*No.* 2) (1), placed on an equal footing, he is judge of law and fact, and his judgments are subject to appeal only, and cannot be reviewed by certiorari. This is not a case in which it is or could be suggested that the particular bankruptcy is a matter not coming within the cognizance of the particular county court, the judge of the county court being, according to the principle of the decision in *In re New Par Consols* (*No.* 2) (1), a judge of co-ordinate jurisdiction with the judges of the High Court. The question whether this particular debtor has by his conduct rendered himself liable under the Bankruptcy Acts to be arrested is a question depending partly on law and partly on fact, which question according to the meaning of the Bankruptcy Acts the county court as a High Court is to decide subject only to that appeal to the Divisional Court, or with leave to a higher Court

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which is given in the matter. If the first step is right—that is, if *In re New Par Consols* (*No.* 2) (1) is rightly decided in principle—all the rest seem to follow of necessity.

Appeal dismissed.

Solicitors for appellant: *Sismey & Sismey, for Skinner, Son & Church, Sunderland.*

Solicitors for respondent: *Solicitor to the Board of Trade.*

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A. M.

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mine—"*Special Reasons*"—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 2.

In cases coming within the words in s. 8, sub-s. 2, of the Bankruptcy Act, 1890, "Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869, unless for special reasons the Court otherwise determines," if any order is made other than an order absolutely refusing the discharge, sufficient special reasons for the determination of the Court must exist, and should be stated in the order. *In re* STEVENS. *Ex parte* BOARD OF TRADE
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2. —— *Execution—Rights of Execution Creditor — Administration of Estate of Deceased Debtor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 125.

An order for the administration of the estate of a deceased debtor under s. 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of s. 45 of that Act, so as to disentitle an execution creditor of the deceased debtor to retain the benefit of his execution against the trustee of the debtor's estate in cases in which he has not completed the execution before the date of the administration order. HASLUCK *v.* CLARK - - Wright J. 28

3. —— *Married Woman—Receiving Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 152 —*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

Judgment was obtained against a single woman on a bill of exchange. She then committed an act of bankruptcy, and the creditor presented a petition for adjudication against her. She promised to settle the demand, and prevailed on the registrar to adjourn the case till March 3. On March 2 she married. On March 24 the registrar made a receiving order. She was not carrying on a trade separately from her husband:—

Held, that on the construction of the Bankruptcy Act, 1883, and the Married Women's Property Act, 1882, as she was not carrying on a trade separately from her husband, she was not subject to the bankruptcy laws, and the receiving order must be discharged. *In re* A DEBTOR. *Ex parte* THE DEBTOR - - - C. A. 576

4. —— *Proof—Husband and Wife—Loan by Wife to Husband for Purposes unconnected with his business—Proof against Husband's Estate—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.

By s. 3 of the Married Women's Property Act, 1882, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." On a claim by a wife to prove against her husband's estate for money lent to him:—

BANKRUPTCY—*continued.*

Held, that the section does not apply to a loan by a wife to her husband for purposes unconnected with his trade or business.

In re Tidswell, Ex parte Tidswell, (1887) 56 L. J. (Q.B.) 548, approved. *In re* CLARKE. *Ex parte* SCHULZE - - - C. A. 330

5. —— *Scheme of Arrangement—Debt carrying Interest exceeding 5 per cent.—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 23—*Construction—Retrospective Effect.*

The Bankruptcy Act, 1890, which was passed on August 18, 1890, and came into operation on January 1, 1891, provides (s. 23) that where a debt, including interest, "has been proved" on a debtor's estate, such interest shall for the purposes of dividend be calculated at a rate not exceeding 5 per cent. per annum, without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts have been paid in full:—

Held, that the section was not retrospective in its operation, and therefore did not apply to a debt, including interest above 5 per cent. proved under a scheme adopted by the Court before the date of the passing of the Act.

Semble: If the scheme had been adopted between the dates of the passing of the Act and of its coming into operation, the section would have applied. *In re* ATHLUMNEY. *Ex parte* WILSON - - - - Wright J. 547

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—— House used for purpose of a sweepstake——Criminal law - - - 647
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BILL OF EXCHANGE—*Indorser—Bill not complete and regular—Indorsement by way of Security—Contract of Suretyship—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 55, 56.

It was agreed between the plaintiffs and A., who owed them money, that they should draw a bill on him, and that the defendant, who was A.'s father, should indorse it to guarantee payment. They accordingly drew a bill on A. to their own order and, without indorsing it, gave it to A., who returned it to them accepted by himself, and indorsed by the defendant. They then indorsed it, and it was not paid at maturity.

In an action against the defendant:—

Held, that he was not liable as indorser under s. 55 of the Bills of Exchange Act, 1882, nor as having incurred the liabilities of indorser under s. 56, since at the time he put his name on the bill it was not complete and regular on the face of it, as it lacked the plaintiff's indorsement; nor

BILL OF EXCHANGE—*continued.*

was he liable on a contract of suretyship, since the provisions of the Statute of Frauds were not satisfied.

The principles laid down in *Steele* v. *McKinlay*, (1880) 5 App. Cas. 754, are not affected by the provisions of the Bills of Exchange Act, 1882. JENKINS & SONS *v.* COOMBER - Div. Ct. 168

2. —— *Oral Agreement to Renew—Inadmissibility of Evidence—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 21, *sub-s.* 2 (*b*); *s.* 29, *sub-s.* 2

Evidence of a contemporaneous oral agreement to renew a bill of exchange is inadmissible on the ground that its effect would be to contradict the terms of the written instrument.

Young v. *Austen*, (1869) L. R. 4 C. P. 553, followed. NEW LONDON CREDIT SYNDICATE, LIMITED *v.* NEALE - - - C. A. 487

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BILL OF SALE—*Default in Payment of Interest—Seizure of Goods—Relief—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

Under a bill of sale the principal sum thereby secured was payable at the end of two years, and in the meantime a certain sum was payable monthly as interest. One of the monthly payments of interest being in arrear, the grantee of the bill of sale took possession of the goods thereby assigned for the purpose of holding the same until payment of the interest due, but not for the purpose of realizing the security by sale of the goods:—

Held, that, under the above-mentioned circumstances, an order could not be made under s. 7 of the Bills of Sale Act, 1882, that upon payment of the principal, interest up to date, and costs the grantee of the bill of sale should give up his security.

Ex parte Wickens, [1898] 1 Q. B. 543, distinguished. *In re* ELLIS - - C. A. 79

2. —— *Validity—Address of Grantee—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9, *Sched.*

A bill of sale given by way of security for the payment of money by the grantor is void, under s. 9 of the Bills of Sale Act, 1882, as not made in accordance with the form in the schedule, if the grantee's address be not given in the bill of sale. ALTREE *v.* ALTREE. STAFFORDSHIRE FINANCIAL COMPANY, CLAIMANTS - - Div. Ct. 267

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COMPANY — *Debenture — Floating Security — Goods seized in Execution—Rights of Debenture-holders.*

A limited company issued debentures secured by a floating charge upon all the property of the company, and also by a trust deed which vested in a trustee for the benefit of the debenture-holders the leasehold property and uncalled capital of the company, and gave him the right to call upon the company to vest in him all other property of the company except chattels within the meaning of the Bills of Sale Acts. Before

COMPANY—*continued.*

the time for the payment of the amount secured by the debentures had arrived certain goods of the company charged by the debentures were seized by the sheriff under a fi. fa. No winding-up resolution was passed and no receiver appointed, nor did the trustee put in force his powers under the deed, but the debenture-holders claimed the goods, and the sheriff interpleaded:—

Held, that the rights of the debenture-holders prevailed over those of the execution creditor since, the goods seized being validly charged with payment of the debentures, there was no interest of the company in them available to satisfy the judgment debt. DAVEY & Co. *v.* WILLIAMSON & SONS, LIMITED. RICHARDS, CLAIMANT - - - - Div. Ct. 194

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A writ of certiorari cannot be issued to bring up an order of a county court judge made when exercising bankruptcy jurisdiction.

The power given by the Bankruptcy Act, 1883, s. 25, sub-s. 1 (*a*), as amended by the Bankruptcy Act, 1890, s. 7, to grant a warrant, under certain circumstances, for the arrest of a debtor "who has absconded or is about to abscond," is not limited as to time, and applies to the case of a debtor absconding before a bankruptcy notice has been issued or a bankruptcy petition presented. SKINNER *v.* COUNTY COURT JUDGE OF NORTHALLERTON - - - C. A. 680

2. —— *Costs—Remitted Action—Judgment in High Court for Part of Claim—Scale applicable in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action of contract brought in the High Court, upon an application for judgment under Order XIV., an order was made that the plaintiff be at liberty to sign final judgment for a sum of 27*l.*, part of the amount claimed, with costs to be taxed; that the defendants have leave to defend as to a sum of 2*l.* odd, which was the residue of the claim then remaining in dispute, and that the action be tried in the county court under s. 65 of the County Courts Act, 1888. The defendants paid the 27*l.* and taxed costs, and afterwards the plaintiff lodged the writ and order in the county court. At the trial in the county court the plaintiff recovered the 2*l.* odd, with costs:—

Held, that he was entitled to a taxation of his costs on the lower scale in use in county courts

COUNTY COURT—*continued.*

where the sum recovered exceeds 2*l.* but does not exceed 10*l.*, and not on the higher scale (Col. B), where the sum recovered exceeds 20*l.* but does not exceed 50*l.*

Keeble v. *Bennett*, [1894] 2 Q. B. 329, distinguished. BAILEY *v.* WATSON & Co. Div. Ct. 270

3. —— *Jurisdiction—Judgment recovered in High Court for Amount of Debt—Order made in County Court for Payment of Debt by Instalments—Execution—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*County Court Rules*, 1889, *Order XXV., r.* 26.

If a creditor, who has recovered judgment against his debtor in the High Court, afterwards obtains from a county court judge an order under s. 5 of the Debtors Act, 1869, for payment of the debt by instalments, he cannot, so long as that order is in force, issue execution upon his judgment in the High Court.

The dicta of Cave J. in *In re Ives, Ex parte Addington*, (1886) 16 Q. B. D. 670, 671, dissented from, and the principle of *Jones* v. *Jenner*, (1856) 25 L. J. (Ex.) 319, approved. MONTGOMERY & Co. *v.* DE BULMES - - - C. A. 420

4. —— *Practice—Notice of Statutory Defence—Statute of Frauds, s.* 17—*Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4—*County Court Rules*, 1889, 1892, 1895, *Order X., r.* 18 (*a*).

In an action on a contract for the sale of goods of the value of 10*l.* the defence of the Statute of Frauds (as re-enacted by the Sale of Goods Act, 1893) is a "statutory defence" within the meaning of Order X., r. 18 (*a*), of the County Court Rules, 1889, and the defendant if he intends to rely on it must give notice of it under rule 10. BRUTTON *v.* BRANSON - - Div. Ct. 219

COUNTY COURT RULES, 1889, 1892, 1895:—

—— Order X., r. 18 (*a*) - - - 219
See COUNTY COURT. 4.

COVENANT—To pay rates, taxes, and assessments—Expenses of paving street—Summary recovery from owner—Claim by owner against tenant - - 315
See LANDLORD AND TENANT. 1.

"COVER"—"Money deposited to abide the event"—Bankruptcy—Proof - 383
See GAMING. 3.

CREDITOR—Administration of estate of deceased debtor—Rights of execution creditor 28
See BANKRUPTCY. 2.

CRIMINAL LAW—*Fugitive Offender—Committal to await Return—Power to admit to Bail—Jurisdiction—Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69).

Where a magistrate has made an order, under the Fugitive Offenders Act, 1881, committing to prison a person accused of having committed an offence, to which Part I. of the Act applies, in some part of Her Majesty's dominions, or within the jurisdiction of a Consular Court, to await his return to the place where the offence is alleged to have been committed, the Queen's Bench Division of the High Court has jurisdiction to admit the accused to bail until the time for his return. THE QUEEN *v.* SPILSBURY - - Div. Ct. 615

CRIMINAL LAW—*continued.*
—— Gaming—House used for purpose of a sweepstake—Betting Act - - 647
See GAMING. 1.
—— Sale of goods to which false trade description is applied — Criminal liability of master for act of servant - - 306
See MASTER AND SERVANT. 1.

CRUELTY TO ANIMALS—"Counselling" commission of offence—Summary jurisdiction - - - - - 641
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CUSTOMS AND INLAND REVENUE ACTS—Estate duty—Settlement—Reservation of interest to settlor—Extent of liability to duty on death of settlor - 534
See REVENUE. 3.

DAIRIES, COWSHEDS AND MILKSHOPS ORDER, 1885—Non-removal of milk—"Building"—Nuisance - - 75
See LONDON. 3.

DAMAGE—By flood — Artificial watercourse—Sluice-gate — Obligation of owner to repair—Easement - - - 608
See WATER.

DAMAGES—Remoteness — Policy — Collision — Loss by detention during repairs 626
See INSURANCE, MARINE. 2.

DEBENTURE—Floating security—Goods seized in execution — Rights of debenture-holders - - - - 194
See COMPANY.
—— Payable to bearer—Usage - - 658
See NEGOTIABLE INSTRUMENT.

DEBT—Carrying interest exceeding 5 per cent.—Scheme of arrangement — Bankruptcy Act, 1890—Retrospective effect - 547
See BANKRUPTCY. 5.

DEBTOR — Absconding before presentation of petition—Arrest—Order made in exercise of bankruptcy jurisdiction — Certiorari - - - - 680
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—— Costs of examination as to debtor's means and of garnishee proceedings—Appeal
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DEBTORS ACT—Execution—Jurisdiction - 420
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DISCHARGE — Refusal of — Misdemeanour — Power to otherwise determine—"Special reasons" - - - - 495
See BANKRUPTCY. 1.

DISCOVERY—Ship's papers—Action by underwriters against re-insurer—Practice 187
See INSURANCE, MARINE. 4.

DISTRESS—*Taxes—Sum due not exceeding 20l.—Charges for Man in Possession—Real Possession—The Distress (Costs) Act*, 1817 (57 *Geo.* 3, *c.* 93), *s.* 1—*The Distress (Costs) Act*, 1827 (7 & 8 *Geo.* 4, *c.* 17).

By the Distress (Costs) Act, 1817, no person making a distress for rent, where the sum demanded and due does not exceed 20*l.*, shall receive more than the charges fixed in the schedule to the Act, and "no person or persons whatsoever shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done." By the Distress (Costs) Act, 1827, the provisions of the previous Act were extended to distresses for assessed taxes or other rates or taxes where the sum demanded and due does not exceed 20*l.*

Where goods are distrained for taxes less in amount than 20*l.*, the collector who distrains has no right to the statutory charge for a man in possession unless he has remained in real possession, or unless there is an agreement binding on the person whose goods are distrained to pay such charges. LUMSDEN *v.* BURNETT - C. A. 177

DISTRICT COUNCIL — Election — Nomination paper—Validity of - - - 202
See LOCAL GOVERNMENT. 4.

DRAIN — Nuisance — Drainage of contiguous houses by combined operation—Subsequent unauthorized connection with drain from adjoining premises - 1
See LONDON. 2.

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EASEMENT — Artificial watercourse — Sluice-gate—Obligation of owner to repair 608
See WATER.

ECCLESIASTICAL LAW—*Faculty—Jurisdiction of Ordinary over all Bodies buried in Consecrated Ground—Licence of Secretary of State—Exhumation for Purposes of Verification—Burial Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 25.

The jurisdiction of the Ordinary over all bodies buried in consecrated ground is not affected by s. 25 of the Burial Act, 1857, which requires the licence of a Secretary of State for the removal of any body from any place of burial unless it be removed from one consecrated place of burial to another by faculty granted by the Ordinary.

The Ordinary may grant a faculty for the exhumation, for the purpose of identification, of a body which has been buried in consecrated ground, and the licence of the Secretary of State is not a condition precedent to the grant, although the faculty may be inoperative until the licence has been obtained:—

Semble: A body buried in consecrated ground cannot be removed without the sanction of the Ordinary. THE QUEEN *v.* DR. TRISTRAM, JUDGE OF THE CONSISTORY COURT OF LONDON
Div. Ct. 371

EDUCATION ACTS—*Teacher's Remuneration—Superannuation Fund—Management by Board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

A school board established and managed a superannuation fund for the payment of allowances to their officers and teachers upon their superannuation. This fund was provided by

EDUCATION ACTS—*continued.*
annual deductions from the salaries of the officers and teachers, made in pursuance of contracts between them and the board;—

Held, affirming the judgment of a Divisional Court, [1898] 1 Q. B. 4, that the officers and teachers could not recover back the amount of the deductions from their salaries, for (1.) even if it was ultra vires for the board to pay the expenses of managing the fund out of the school rates, it was no part of the contract between the board and the officers and teachers that this should be done, and the making of the contract was therefore not ultra vires; (2.) assuming that the board could not undertake the management of the fund, in the absence of power under the Elementary Education Acts to do so, the money having been applied to the purposes for which it was subscribed, and the subscribers having had the right to participate in the benefits of the fund, there had been no failure of consideration. PHILLIPS *v.* LONDON SCHOOL BOARD. COCKERTON *v.* SAME - - - - - C. A. 447

ELECTION—District council—Nomination paper—Validity of - - - 202
See LOCAL GOVERNMENT. 4.

—— Return of election expenses—"Transmit"—Error in return—Penalties - 251
See PARLIAMENT.

ELEMENTARY EDUCATION—Teacher's remuneration—Superannuation fund—Management by board - - - 447
See EDUCATION ACTS.

EMPLOYERS' LIABILITY ACT—Liability of mine-owner—Working "under a contract with an employer" - - 588
See MASTER AND SERVANT. 3.

EQUITY OF REDEMPTION—Purchase in England of—Property situate out of the United Kingdom—Agreement for sale—Stamp - - - - 141
See REVENUE. 4.

ESTATE DUTY — Exemption—Postponement—Property settled by husband or wife 39
See REVENUE. 1.

—— Settlement — Reservation of interest to settlor—Extent of liability to duty on death of settlor - - - 534
See REVENUE. 3.

ESTOPPEL—Licence—Removal — Objection on same grounds as previous objection to transfer - - - - 347
See LICENSING ACT. 2.

—— Res judicata—Decision quashing previous rate - - - - - 66
See HIGHWAY. 2.

EVIDENCE—Admissibility—Poor-rate—Appeal
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—— Commission — Subject-matter of action—Sending out of jurisdiction for identification - - - - - 160
See PRACTICE. 4.

—— Inadmissibility—Oral agreement to renew bill of exchange - - - 487
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EVIDENCE—*continued.*
—— Onus of proof—Rates for merchandise—Rebate—Station accommodation - 435
See RAILWAY. 2.

EXAMINATION—Costs of examination as to debtor's means and of garnishee proceedings—Appeal - - - 492
See PRACTICE. 1.

EXECUTION—Administration of estate of deceased debtor — Rights of execution creditor - - - - - 28
See BANKRUPTCY. 2.

—— Goods seized in—Floating security—Rights of debenture-holders - - 194
See COMPANY.

—— Judgment recovered in High Court for amount of debt—Order made in county court for payment by instalments 420
See COUNTY COURT. 3.

—— Seizure of goods—Going out of possession—Abandonment - - - 173
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—— Seizure of goods in—Interpleader—Payment into court by claimant—Seizure of the goods by another execution creditor 164
See PRACTICE. 5.

EXHUMATION—For purposes of verification—Licence of Secretary of State—Faculty
See ECCLESIASTICAL LAW. 371

FACTOR—Bill of exchange—Dishonour by buyer—Possession of goods—Consent of seller
See SALE OF GOODS. 61

FACTORY ACTS—*Neglect to fence Machinery—Penalty—Statutory Duty—Action on Statute—Master and Servant—Common Employment—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 5, *sub-s.* 4; *ss.* 81, 82, 86, 87.

An action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed upon him by s. 5, sub-s. 4, of the Factory and Workshop Act, 1878.

The defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection. GROVES *v.* LORD WIMBORNE C. A. 402

FACULTY—Exhumation for purposes of verification—Licence of Secretary of State 371
See ECCLESIASTICAL LAW.

FATAL ACCIDENTS — Alien — Negligence of British subject—Cause of action outside jurisdiction - - - - 430
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FENCE—Liability of owner of fence adjoining highway—Defective condition—Injury to child - - - - 320
See NUISANCE.

—— Neglect to fence machinery—Penalty—Common employment - - 402
See FACTORY ACTS.

FINANCE ACT—Estate duty—Settlement—Reservation of interest to settlor—Extent of liability to duty on death of settlor
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FLOATING SECURITY—Goods seized in execution—Rights of debenture-holders 194
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FLOOD—Damage by—Artificial watercourse—Sluice-gate — Obligation of owner to repair - - - - 608
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FOOTPATH — Evidence of liability to repair ratione tenuræ—Remedy against a person so liable to repair - - 83
See HIGHWAY. 1.

FRAUD—Judgment obtained by—Fresh action to set aside judgment—Jurisdiction 36
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FRAUDS, STATUTE OF—Practice—Notice of statutory defence—Sale of goods 219
See COUNTY COURT. 4.

FUGITIVE OFFENDER — Committal to await return—Power to admit to bail - 615
See CRIMINAL LAW.

GAMING—*Betting—House used for purpose of a Sweepstake—Criminal Law—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

A person who permits his house to be used for the sale of tickets and the receipt of purchase-money for such tickets in an ordinary sweepstake on a horse-race does not commit any offence against the Betting Act, 1853. THE QUEEN *v.* HOBBS - - - - C. C. R. 647

2. —— *Illegal Consideration—Cheque—Bet on Horse-race*—9 *Anne, c.* 14—*Gaming Act*, 1835 (5 & 6 *Will.* 4, *c.* 41), *s.* 1.

Where a cheque was given by the defendant in payment of bets upon horse-races lost by him, and indorsed by the payee to the plaintiff for value with notice of the consideration for which it was given:—

Held, that the plaintiff could not maintain an action upon the cheque, as it must be deemed by virtue of 5 & 6 Will. 4, c. 41, to have been given for an illegal consideration. WOOLF *v.* HAMILTON C. A. 337

3. —— *Purchase and Sale of Shares—Payment of Differences—Balance due from Broker—Purchase of Shares from Broker—Balance to be taken in Payment—Breach of Contract by not delivering—"Cover"—"Money deposited to abide the Event"—Bankruptcy—Proof—Gaming Act*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18.

Gaming contracts between a stockbroker and his client, for differences on the sale and purchase of stocks and shares, resulted in a balance in favour of the client. It was agreed that the broker should sell certain stock to the client which he would accept in payment of the balance due to him, and in pursuance of this agreement a contract note was forwarded by the broker. The stock was not delivered, and the client sought to prove in bankruptcy, against the estate

GAMING—*continued.*

of the broker, for damages for non-delivery of the stock:—

Held, reversing the judgment of Wright J., that, as the balance resulting from the gambling transactions could not have been recovered from the broker, there was no consideration for the promise to deliver the stock, and no proof could be admitted in respect of the non-delivery.

The client had deposited money with the broker as cover to secure him against loss on the gaming transactions which had resulted in a balance in favour of the client:—

Held, affirming the judgment of Wright J., that, the money deposited not having been used for the purpose for which it was deposited, proof in respect of the amount was admissible. *In re* CRONMIRE. *Ex parte* WAUD - - C. A. 383

GARNISHEE — Costs of examination as to debtor's means and of garnishee proceedings—Appeal - - - 492
See PRACTICE. 1.

GOODWILL — Stamp — Conveyance on sale — Leasehold interest in licensed house 507
See REVENUE. 6.

GUARANTEE—Interest—Appropriation of payments—Banking account—Interest converted into principal - - 460
See LIMITATIONS, STATUTE OF. 1.

GUEST—Loss of property—Liability of innkeeper
See INNKEEPER. 284

HIGHWAY—*Footpath—Evidence of Liability to repair Ratione Tenuræ—Remedy against a Person so Liable to Repair.*

The defendant was the occupier of two adjoining fields through which ran a public footpath crossing the fence between the two fields by means of a stile. The defendant and his predecessors in occupation had occasionally done slight repairs to the footpath and the stile; but there was no evidence that he or they had ever been required by the highway authority to do so. The plaintiff, who was using the footpath as a member of the public, fell in getting over the stile in consequence of the stile being out of repair, and was injured. He sued the defendant, charging that he was liable to repair ratione tenuræ:—

Held, that the fact of the repairs done by the defendant and his predecessors, being consistent with such repairs having been done by them for their own benefit, was no evidence of any liability to repair ratione tenuræ.

Quære, whether an action will lie against a person liable to repair a public way ratione tenuræ for special damage suffered by a member of the public in consequence of the way being out of repair. RUNDLE *v.* HEARLE - Div. Ct. 83

2. —— *Rate—Exemption—Liability to repair Ratione Tenuræ—Alteration of Highway—Estoppel—Res judicata—Decision quashing previous Rate—Highway Acts*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 33, *and* 1862 (25 & 26 *Vict. c.* 61), *s.* 35.

In a hamlet forming part of a township all the highways were repairable by the occupiers of lands ratione tenuræ, and highway rates were

HIGHWAY—*continued.*
not leviable by reason of exemption in the Highway Act, 1835, s. 33.

A railway company was liable ratione tenuræ to repair a highway in the hamlet.

An order was made by justices, under the Highway Act, 1862, s. 35, that all the highways in the hamlet should be parish highways, and repaired by a highway board, and the sums to be paid by the occupiers were fixed.

The company was rated, in respect of its lands, to a rate for the expenses incurred by the highway board in repairing the highways within its district, including those in the hamlet.

The company appealed to quarter sessions against the rate, and the appeal was allowed.

By order of the Local Government Board the hamlet was detached from the township, and amalgamated with another township.

The company was afterwards rated, in respect of its lands in the hamlet, for expenses incurred by a district council, the successor of the highway board, for repair of the highway in the hamlet.

On a case stated by quarter sessions on appeal from the latter rate:—

Held, first, that the exemption under the Highway Act, 1835, s. 33, determined when by the justices' order the highway became a parish highway, and that, by that order, it was repairable by the contributions of every one in the parish, including those formerly liable ratione tenuræ, and therefore the company was liable to be rated:—

Held, secondly, that the order of quarter sessions quashing the first rate did not operate as an estoppel, so as to preclude the sessions from deciding that the company was liable to be assessed to the second rate. NORTH EASTERN RAILWAY COMPANY *v.* DALTON OVERSEERS
Div. Ct. 66

—— Liability of owner of fence adjoining—Defective condition—Injury to child 320
See NUISANCE.

HUSBAND AND WIFE—Estate duty—Property settled by husband or wife—Exemption Postponement - - - 39
See REVENUE. 1.

—— Loan by wife to husband for purposes unconnected with his business—Proof 330
See BANKRUPTCY. 4.

—— Married woman—Receiving order - 576
See BANKRUPTCY. 3.

IDENTIFICATION—Sending out of jurisdiction for—Evidence — Commission—Subject-matter of action - - - 160
See PRACTICE. 4.

INCLOSURE — *Turbary — Allotment for — Legal Estate in Land—Compensation to Lord of Manor —Inclosure Act*, 1845 (8 & 9 *Vict. c.* 118), *ss.* 34, 73, 76.

An allotment of land made in pursuance of ss. 34 and 73 of the Inclosure Act, 1845, to the churchwardens and overseers of a parish in trust to allow the occupiers of certain ancient cottages in the parish to get turf therefrom vests the legal

INCLOSURE—*continued.*
estate in the land in the churchwardens and overseers.

Attorney-General v. *Meyrick*, [1893] A. C. 1, and *Reg.* v. *Inclosure Commissioners*, (1871) 23 L. T. 778, distinguished. SIMCOE *v.* PETHICK.
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INDORSEMENT—Bill not complete and regular —Indorsement by way of surety 163
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INFORMATION—"Counselling" commission of offence—Cruelty to animals—Summary jurisdiction - - - - 641
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INJURY—Liability of owner of fence adjoining highway—Defective condition - 320
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INLAND REVENUE.
See Cases under REVENUE.

INN—Licence.
See Cases under LICENSING ACTS.

—— Loss of property—Innkeeper—Liability—"Guest" - - - - 284
See INNKEEPER.

—— Poor-rate — Assessment — Competition of brewers—"Tied" houses - - 630
See POOR-RATE. 2.

INNKEEPER — *Liability* — "*Guest*" — *Loss of Property.*

The plaintiff, being on his way from his place of business in Liverpool to his home outside the town, went into the dining-room of an hotel in Liverpool, kept by the defendants, to get a meal, and put his overcoat in a place where coats were ordinarily kept in that room. The coat was missing when he had finished his meal. Sleeping accommodation for guests at the hotel was provided if required; but a great number of people used it every day for the purpose of dining there only:—

Held, that there was sufficient evidence to establish the relation of innkeeper and guest between the defendants and the plaintiff so as to make them liable for the loss of the coat without proof of negligence on their part. ORCHARD *v.* BUSH & Co. - - - - Div. Ct. 284

INSURANCE, BURGLARY — *Loss by Theft — Entry by opening Shop Door*—"*Actual forcible and violent Entry.*"

A policy of insurance was expressed to be made "against loss or damage by burglary and housebreaking as hereinafter defined," and witnessed that, if the property, which was jewellery, should be lost by theft following upon actual forcible and violent entry upon the premises wherein the same was situate, the insurers should pay. The jewellery was in a shop, the front door of which was shut but not locked nor bolted, and access could be gained by turning the handle of the door. In the absence of the porter, before the shop was opened for business in the morning, somebody opened the front door, entered the shop, and stole the jewellery.

On a case stated in arbitration:—

Held, that the loss was a loss by theft following upon actual forcible and violent entry, within the meaning of the policy, and the assured was

INSURANCE, BURGLARY—*continued.*
entitled to recover. *In re* George and Goldsmiths and General Burglary Insurance Association - - - - Div. Ct. 136

INSURANCE, MARINE — *Policy — Attachment of Risk—Ships "sailing" on or after a Specified Date.*

In an action on a policy of marine insurance on goods in ships "sailing on or after March 1," it appeared that the ship in question had finished loading her cargo before ten o'clock at night on February 29, and, having previously cleared the Custom House, was then ready to proceed to sea; but by a regulation of the port ships were not permitted to go out to sea after dark. At ten o'clock the master, with the object of keeping his crew on board so as to be ready to start early in the morning, moved the ship away from the wharf about five hundred yards out into the river and there anchored. In so moving the ship, he placed her in a slightly more advantageous position for starting than she would have been in if she had remained at the wharf, but the gaining of that advantage was no part of the master's motive in moving her. On the following morning, March 1, she proceeded on her voyage:—

Held (affirming the judgment of Mathew J., [1898] 1 Q. B. 27), that the ship sailed on March 1, and not on February 29, and that the policy attached. Sea Insurance Company *v.* Blogg C. A. 398

2. —— *Policy—Construction—Collision—Loss by Detention during Repairs—Damages—Remoteness.*

Barges were insured against loss or damage, which the insured should sustain, or become liable to others for, by reason of the collision of the barges with any other vessel. The barges having been damaged by collision, the insured claimed damages for loss in consequence of detention of the barges during repairs:—

Held, that, in order to be recoverable, the loss must be proximately caused by the perils insured against, and that the damages claimed were too remote, and could not be recovered under the policy. Shelbourne & Co. *v.* Law Investment and Insurance Corporation, Limited Kennedy J. 626

3. —— *Policy—Loss by Negligence of Master—Master also part Owner.*

In an action by the owners of a ship, including the master, on a policy of marine insurance, for loss within the perils insured against, the fact that the loss arose through the negligent navigation of the master, not amounting to wilful negligence, affords no defence to his claim. Trinder, Anderson & Co. *v.* Thames and Mersey Marine Insurance Company. Trinder, Anderson & Co. *v.* North Queensland Insurance Company. Trinder, Anderson & Co. *v.* Weston, Crocker & Co. - C. A. 114

4. —— *Practice — Action by Underwriter against Reinsurer—Discovery of Ship's Papers.*

In an action by an underwriter on a policy of marine insurance brought by him against a reinsurer, the latter is entitled to discovery of ship's papers. China Traders' Insurance Company *v.* Royal Exchange Assurance Corporation C. A. 187

INSURANCE, MARINE—*continued.*

5. —— *Reinsurance—Policy—"Open Cover"—Sum Insured not Specified — Contract for Sea Insurance—Validity—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 93, 95.

By a document called an "open cover" the defendant, with other underwriters, agreed to reinsure the plaintiffs to the extent of the excess, over certain amounts mentioned in the document, upon risks undertaken by them from time to time, on goods shipped by certain steamship lines therein mentioned. The limit of the excess of any one ship and the proportion of this amount taken by each underwriter were specified. Goods which were insured by the plaintiffs, on a steamship of one of the lines, were lost by a peril insured against, and the plaintiffs paid the insurance and sued the defendant for his proportion of the excess:—

Held, that the document was a "contract for sea insurance" within s. 93, sub-s. 1, of the Stamp Act, 1891, which by that sub-section was not valid unless expressed in a policy of sea insurance, and that, as it did not specify "the sum or sums insured" as required by sub-s. 3, it was invalid as a policy of sea insurance, and could not be stamped and sued on as such, nor could it be sued on as a contract to issue a policy.

Judgment of Mathew J., reported [1898] 1 Q. B. 829, affirmed. Home Marine Insurance Company *v.* Smith - - - C. A. 351

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INTEREST—Continuing guarantee—Appropriation of payments—Banking account—Interest converted into principal 460
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—— Payment of, by co-debtor—Borrower and lender—Money charged upon land 223
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—— Scheme of arrangement — Debt carrying interest exceeding 5 per cent.—Bankruptcy Act, 1890—Retrospective effect
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INTERPLEADER—Seizure of goods in execution—Payment into court by claimant—Seizure of the goods by another execution creditor - - - 164
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JOINDER—Separate causes of action — Same transaction—Joinder of plaintiffs 44
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JUDGMENT—Obtained by fraud—Fresh action to set aside judgment—Jurisdiction 36
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JURISDICTION — Debtor — Absconding before presentation of petition—Arrest—Order made in exercise of bankruptcy jurisdiction—Certiorari - - - 680
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—— Fugitive Offender — Committal to await return—Power to admit to bail 615
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—— Fatal Accidents Acts—Cause of action outside jurisdiction - - - 430
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—— Judgment obtained by fraud—Fresh action to set aside judgment - - 36
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—— Summary jurisdiction—Cruelty to animals—"Counselling" commission of offence—Information - - - - 641
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JUSTICES—*Cruelty to Animals—Offence Punishable upon Summary Conviction—Information—"Counselling" Commission of Offence—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

A person who has counselled the commission of an offence punishable on summary conviction may, under s. 5 of the Summary Jurisdiction Act, 1848, be convicted upon an information which charges him with having committed such offence as a principal offender.

A defendant was, therefore, held liable to conviction upon an information which charged him with having cruelly ill-treated a horse by causing it to be worked in an unfit state contrary to s. 2 of 12 & 13 Vict. c. 92, although the offence proved was that he had knowingly counselled the owner of the horse to cause the act of cruelty to be done. BENFORD *v.* SIMS - Div. Ct. 641

—— County Council—By-law—Reasonableness—Playing music or singing after request to desist - - - - 91
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—— False trade description—Oral statement—Description in invoice written at purchaser's request - - - 300
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—— Fugitive offender — Committal to await return—Power to admit to bail—Jurisdiction - - - - 615
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—— Licensing Acts.
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—— Merchandise marks—Criminal liability of master for act of servant - - 306
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—— Merchandise marks—False trade description—Absence of intent to deceive—Liability - - - - 19
See TRADE-MARK. 2.

—— Nuisances and sanitation—Non-removal of milk - - - - - 75
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—— Poor-rate—Appeal—Net annual value—Gross estimated rental—Evidence—Admissibility - - - 237
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—— Poor-rate—Assessment—Licensed house—Competition of brewers — "Tied" houses - - - - 630
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—— Rate—Estoppel—Res judicata—Decision quashing previous rate - - 66
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—— Rebuilding on old site—Certified plans of old building - - - 31
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—— Salary of clerk to—Separate court of quarter sessions—Liability for costs of - 468
See LOCAL GOVERNMENT. 2.

—— Sewer—Drainage of contiguous houses by combined operation - - 1
See LONDON. 2.

—— Streets—Proposed works—Objections 274
See LOCAL GOVERNMENT. 5.

—— Thames navigation — By-law—Waterman on tug to assist in navigation—Ultra vires - - - - - 578
See THAMES.

—— Water supply — Liability of contributory place for expense of water supply to part of such place - - - 358
See LOCAL GOVERNMENT. 7.

LANDLORD AND TENANT—*Lease—Covenant to Pay Rates, Taxes, and Assessments—Expenses of Paving Street—Summary Recovery from Owner—Claim by Owner against Tenant—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Expenses of paving, &c., a street, recovered in a summary manner, by an urban authority, from the owner of premises outside the metropolis, under the Public Health Act, 1875, s. 150, cannot be recovered by the owner from his tenant, under a covenant by the tenant to pay "all rates, taxes, and assessments whatsoever, which now are, or during the term shall be, imposed or assessed upon the premises, or the landlords or tenants in respect thereof, by authority of Parliament or otherwise, except the landlord's property tax." BAYLIS *v.* JIGGENS - Channell J. 315

2. —— *Lease—Premises let in Floors—Injury from overflowing Cistern—Negligence of Plumber.*

The defendant was the owner of premises to which water was laid on, and he had a cistern on the fourth floor. The plaintiff became tenant of the ground floor, and took his supply of water from the defendant. A leakage from the cistern having been noticed by the plaintiff, he informed the defendant, who instructed a competent plumber to remedy it. In consequence of the negligence of the plumber an overflow occurred, which damaged the plaintiff's goods:—

Held, that the defendant was not liable, since the plaintiff had assented to the water being on the premises, and therefore the defendant, by instructing a competent plumber to remedy the leakage, had discharged his duty to the plaintiff. BLAKE *v.* WOOLF - - - Div. Ct. 426

3. —— *Lease — Re-entry — Proviso for — Company—Liquidation for Purposes of Reconstruction.*

A lease contained a proviso for re-entry if

LANDLORD AND TENANT—*continued.*
the lessees, being a company, "shall enter into liquidation voluntary or compulsory." The lessees, a solvent limited company, entered into liquidation for the purpose only of reconstruction with additional capital:—
Held, that this was a liquidation within the meaning of the proviso. HORSEY ESTATE, LIMITED *v.* STEIGER AND THE PETRIFITE COMPANY Hawkins J. 259

LEASE - - - 259, 315, 426
See LANDLORD AND TENANT. 1—3.

LEASEHOLDS — Stamp—Conveyance on sale—Leasehold interest in licensed house—Goodwill - - - - 507
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LIABILITY—"Guest"—Loss of property 284
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—— Merchandise marks—False trade description—Absence of intent to deceive 19
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—— Mine-owner—Employers' Liability Act—Working "under a contract with an employer" - - - - 588
See MASTER AND SERVANT. 3.

—— Servant of one person hired by another to drive his carriage—Liability of hirer for negligence of driver - - 565
See MASTER AND SERVANT. 2.

LIBEL — *Practice — Payment into Court—Newspaper—Pleading—Libel Act*, 1843 (6 & 7 *Vict. c.* 96), *s.* 2—*Rules of Supreme Court, Order* XXII., *r.* 1.
The defendants in an action for a libel published in a newspaper pleaded by way of defence, in accordance with the Libel Act, 1843, s. 2, that the libel was published without actual malice, and without gross negligence, an apology, and payment into court of 5*l.* The jury at the trial found that the libel was published without actual malice, but not without gross negligence, and that the apology was sufficient, and they assessed the damages at 5*l.*:—
Held, that the defendants, having made the payment into court as part of a defence under the Libel Act, 1843, s. 2, and having failed at the trial on that defence, were not entitled to avail themselves of the payment into court as being made under Order XXII., r. 1, and therefore the plaintiff was entitled to judgment. OXLEY *v.* WILKES - - - C. A. 56

LICENCE.
See Cases under LICENSING ACTS.

LICENSING ACTS — *Licence — New Licence — Confirmation of Provisional Licence — Rule of Practice imposing Condition on Right to Oppose — Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *ss.* 37, 43.
By s. 37 of the Licensing Act, 1872, a grant of a new licence in counties by licensing justices is not valid unless confirmed by the county licensing committee. By s. 43, any person who opposes before licensing justices the grant of a new licence, and no other person, may oppose the confirmation of the grant by the confirming authority; by the same section power is given in counties to the justices in quarter sessions to

LICENSING ACTS—*continued.*
make rules as to the proceedings to be adopted for confirmation of new licences.
A court of quarter sessions, acting under s. 43, made a rule that every person intending to oppose the confirmation of any provisional licence before the county licensing committee must, within seven days after the grant of the provisional licence, give notice to the applicant and to the clerk of the peace of his intention to oppose the confirmation:—
Held, that the rule was ultra vires, as imposing a condition upon the statutory right to oppose the confirmation of the licence not imposed or authorized by the statute. THE QUEEN *v.* BIRD. *Ex parte* NEEDES - - - Div. Ct. 340

2. —— *Licence—Renewal—Objection on same Grounds as previous Objection to Transfer—Estoppel—Wine and Beerhouse Act*, 1869 (32 & 33 *Vict. c.* 27), *ss.* 8, 19.
Where, upon an application for the transfer of a licence to sell beer by retail on or off premises licensed prior to May 1, 1869, an objection is made upon one of the four grounds enumerated in s. 8 of the Wine and Beerhouse Act, 1869, but the justices in the exercise of their discretion grant the transfer, the same objection upon the same facts may be taken at the next general annual licensing meeting to the renewal of the licence, and the renewal may be refused on that ground. SMITH *v.* SHANN - Div. Ct. 347

3. —— *Practice—Appeal—Refusal to renew Licence — Appearance of Licensing Justices in Opposition to Appeal—Power of Quarter Sessions to give Costs against Justices so Opposing—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 27, 29.
Where, upon an appeal to quarter sessions against a refusal by licensing justices to renew a licence, the licensing justices appear and oppose the renewal, the quarter sessions have no power under s. 27 of the Alehouse Act, 1828, to order the licensing justices to pay costs to the appellant in the event of the appeal being allowed. THE QUEEN *v.* STAFFORDSHIRE JUSTICES Div. Ct. 231

LIGHTERMAN—Thames navigation—By-law—Ultra vires—Waterman on tug to assist in navigation - - - 578
See THAMES.

LIMITATIONS, STATUTE OF — *Interest—Continuing Guarantee—Appropriation of Payments—Banking Account—Interest converted into Principal.*
In an action on a guarantee it appeared that the defendant had guaranteed to the plaintiffs, a banking company, payment of all moneys which might be owing to them in account with a customer with interest, commission, and other banking charges; and it was provided that the guarantee should be a continuing guarantee, and should not be withdrawn except by six months' written notice from the guarantor. The plaintiffs made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action, but made no advances subsequently to that period, and the customer paid sums into his account with the bank against his liability from time to time down to a period within six years before the action.

LIMITATIONS, STATUTE OF—*continued.*

At the end of each half-year the plaintiffs debited him in account with the interest for the half-year on the amount owing by him from time to time, and carried forward the balance to his debit as the amount owing at the commencement of the next half-year:—

Held, that the plaintiffs' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitations, but that the action was maintainable in respect of interest which had accrued due from the customer within six years before the action and had not been paid.

The rule with regard to the appropriation of payments by which interest is presumed to be paid before principal is not applicable in the case of interest on an overdrawn account which according to the practice of bankers has been from time to time converted into principal. PARR'S BANKING COMPANY *v.* YATES - - C. A. 460

2. —— *Interest—Payment of Interest by Co-debtor—Borrower and Lender—Money charged upon Land—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*The Limitation Act*, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*The Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14—*Implied Repeal.*

The defendants, trustees of a will, in 1882 borrowed from the plaintiffs a sum of money, the repayment of which was secured in the following manner. The defendants, being entitled as beneficial owners to certain mortgages of land, procured the person in whom the legal estate of the mortgages was vested to assign them to the plaintiffs by deeds of assignment to which the defendants were not parties. Then by a further deed to which both the defendants and plaintiffs were parties it was agreed that the money advanced by the plaintiffs should constitute a first charge upon the principal and interest to be received or recovered by the plaintiffs by virtue of the mortgages so assigned, and that the plaintiffs should not realize the mortgages without first giving the defendants the opportunity of paying off the amount advanced to them. This deed contained no express covenant by the defendants to repay the plaintiffs their advance. Immediately after the execution of this deed, in 1882, L., one of the defendants, retired from the trust. Interest was paid to the plaintiffs by the remaining trustees down to 1896. In April, 1897, the plaintiffs brought their action to recover the balance of their advance then remaining unpaid. L. contended that, as there was no covenant to repay the advance, the debt was a simple contract debt within the statute of 21 Jac. 1, c. 16, that the provisions of s. 14 of the Mercantile Law Amendment Act, 1856, prevented the payment of interest by his co-trustees from keeping the debt alive against him, and that consequently as against him the plaintiffs' claim was barred:—

Held, that the money advanced by the plaintiffs was "money secured by mortgage" and "charged upon or payable out of land" within the meaning of s. 8 of the Real Property Limitation Act, 1874; that that Act and not the statute of 21 Jac. 1, applied; that L. was not within the

LIMITATIONS, STATUTE OF—*continued.*

protection of the Mercantile Law Amendment Act, 1856; and that the plaintiffs' claim was not barred as against him. BARNES *v.* GLENTON Lord Russell of Killowen C.J. 223

LIQUIDATION—Of company for purposes of reconstruction—Lease—Proviso for re-entry - - - - 259
See LANDLORD AND TENANT. 3.

LOCAL GOVERNMENT—*Bridges (not being County Bridges) taken over by County Council—Liability of larger Quarter Sessions Boroughs to Contribute to Cost of—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 6, 35, *sub-s.* 2.

The exercise by a county council of the powers conferred on them by s. 6 of the Local Government Act, 1888, of purchasing or taking over existing bridges not then being county bridges, or erecting new bridges, or maintaining, repairing, or improving any bridges so purchased, taken over, or erected, is a "purpose for which the quarter sessions of the county" were "authorized to incur cost" within the meaning of s. 35, sub-s. 2; and consequently a quarter sessions borough, not being a county borough, but containing a population of 10,000 or upwards, which, by reason of its liability to repair the bridges within the borough, was at the passing of the Act exempt from contributing to the costs of the then existing county bridges, cannot be assessed to county contributions in respect of costs incurred by the county council in the exercise of any of the above-mentioned powers. BURY ST. EDMUNDS CORPORATION *v.* WEST SUFFOLK COUNTY COUNCIL - - - - Div. Ct. 246

2. —— *County Council—Borough having Population under* 10,000—*Separate Court of Quarter Sessions—Liability for Costs of—Salary of Recorder—Fees of Clerk of the Peace—Salary of Clerk to Justices—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 35, 38, 84.

In the case of boroughs having a separate court of quarter sessions and commission of the peace, which contained according to the census of 1881 a population of less than 10,000, the Local Government Act, 1888, has not transferred the obligation of paying the salary of the recorder, the fees of the clerk of the peace, and the salary of the clerk of the borough justices from the borough to the county council.

Appeal from Wills J., [1898] 1 Q. B. 141, dismissed and cross-appeal allowed.

Decision in *Ex parte Kent County Council and Council of Sandwich*, [1891] 1 Q. B. 389, and *In re County Council of Hertfordshire*, [1895] 1 Q. B. 43, to the contrary, overruled. THETFORD CORPORATION *v.* NORFOLK COUNTY COUNCIL C. A. 468

3. —— *County Council—By-law—Reasonableness—Playing Music or Singing after Request to Desist.*

In determining the validity of by-laws made by public representative bodies, such as county councils, the Court ought to be slow to hold that a by-law is void for unreasonableness. A by-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in

LOCAL GOVERNMENT—*continued.*

bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

A county council, claiming to act under their statutory powers, made a by-law prohibiting any person from playing music or singing in any public place or highway within fifty yards of any dwelling-house after being requested by any constable, or an inmate of such house, or his or her servant, to desist:—

Held, by Lord Russell of Killowen C.J., Sir F. H. Jeune, Pres. of P. D. and A. Div., Chitty L.J., Wright, Darling, and Channell JJ. —Mathew J. dissenting—that the by-law was valid.

Semble: In cases where there is no appeal from the Divisional Courts, a specially constituted Divisional Court appointed by the Chief Justice of England has power to review, and if it thinks fit to differ from, previous decisions of Divisional Courts on the same subject. KRUSE *v.* JOHNSON **Div. Ct. 91**

4. —— *District Council—Election—Nomination Paper—Validity of—Finality of Returning Officer's Decision — Rural District Councillors' Election Order*, 1898, *r.* 7 (2)

A nomination paper of a candidate for election as a rural district councillor is not invalid by reason of its having been signed by the proposer and seconder before the name of the candidate was filled in. COX *v.* DAVIES - **Div. Ct. 202**

5. —— *Streets—Proposed Works—Objections —"Insufficient or Unreasonable," Construction of —Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 7, 8.

An objection was taken to works of paving, levelling, sewering, and lighting a street proposed by an urban authority to be done under the private Street Works Act, 1892, the ground of objection being that the proposed works were "insufficient" and "unreasonable" within the meaning of s. 7 (*d*). On the hearing of the objection before a court of summary jurisdiction it was proved that the works were necessary and proper in order that the street might be safely and conveniently used as a street; but the justices allowed the objections, holding that the works were insufficient, and therefore unreasonable, because the street at one point was too narrow, and the urban authority did not propose to take any steps to have it widened:—

Held, that the expression "insufficient" in s. 7 (*d*) limited the jurisdiction of the court of summary jurisdiction to determining whether or not the works were insufficient to effect the purpose proposed to be effected by them, and therefore that the justices' decision, being founded upon considerations which they ought not to have entertained, was wrong. MANSFIELD CORPORATION *v.* BUTTERWORTH - **Div. Ct. 274**

6. —— *Unions — Transfer of Part of one Union to another Union—Adjustment of Property and Liabilities — Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 68.

By an order made under the Local Government Acts, 1888 and 1894, part of a township within the area of the union of R. was detached from it and transferred to the union of H. On a dispute arising between the two unions as to how the liability for loans contracted by the union of R. previously to its division was to be borne:—

Held, that the liability was a matter for adjustment under s. 68 of the Local Government Act, 1894, as between the union of R. and the union of H., and not merely as between the union of R. and the portion of it which had been transferred to the union of H.

The portion of the union of R. which was so transferred to H. was a remunerative area; that is to say, the number of its poor was small in proportion to its contribution to the rates:—

Held, that the loss to R. of the contribution of the part so transferred was not a matter which of itself required adjustment under s. 68, though it was an element to be taken into consideration in adjusting other matters which did require adjustment. *In re* ROCHDALE UNION AND HASLINGDEN UNION - - **Div. Ct. 206**

7. —— *Water Supply—Contributory Place— "Special Expenses"—Water Rates and Rents— Liability of Contributory Place for Expense of Water Supply to Part of such Place—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 51, 229, 230 — *Public Health* (*Water*) *Act*, 1878 (41 & 42 *Vict. c.* 25), *s.* 10.

Where a rural sanitary authority has, under the provisions of the Public Health Act, 1875, supplied water to part of a contributory place, the expenses both of supply and of maintenance must, so far as they cannot be defrayed by a reasonable water rate or water rent to be paid by the consumers, be raised as special expenses by a rate on the whole contributory place. HORN *v.* SLEAFORD RURAL DISTRICT COUNCIL **Div. Ct. 358**

LONDON—*Buildings—Rebuilding on Old Site— Certified Plans of Old Building—London Building Act*, 1894 (57 & 58 *Vict. c. ccxxiii.*), *s.* 43.

By s. 43 of the London Building Act, 1894, a person who is desirous of building a domestic building on the site of a domestic building existing at the passing of the Act may submit to the district surveyor for certification "plans shewing the extent of the previously existing domestic building in its several parts," and on getting a certificate of the accuracy of the plans may build without regard to the restrictions imposed by the Act upon the erection of new buildings, provided he does not deviate in any respect from the certified plans:—

Held, that the plans which he must get certified under that section as a condition of the right of so building are not confined to ground-plans, but include plans shewing sections and elevations and the areas of the several floors. PAYNTER *v.* WATSON - - - - **Div. Ct. 31**

2. —— *Nuisance—Sewer—Drain—Drainage of Contiguous Houses by Combined Operation— Subsequent unauthorized Connection with Drain from Adjoining Premises — Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

Four houses in the metropolis were in 1874 drained by a combined operation under an order of the vestry. A drain from the stable of an adjoining house was afterwards, without the knowledge of the vestry, connected with this

LONDON—*continued.*
drain, and the drainage from the stable turned into it. Subsequently a nuisance arose owing to the defective drainage of the four houses, and the then owner of the houses, who had not authorized or known of the making of the connection with the drain from the stable, was required by the vestry to abate the nuisance:—

Held, that the unauthorized connection of the drainage from the stable with the drains from the four houses, converted the latter into a sewer, and that therefore the owner was not liable to abate the nuisance. GEEN *v.* VESTRY OF ST. MARY, NEWINGTON - - - **Div. Ct. 1**

3. —— *Nuisances and Sanitation — Non-removal of Milk — "Building" — Dairies, Cowsheds, and Milk Shops Order*, 1885.

No. 29 of the Regulations of the London County Council as to Dairies, Cowsheds, and Milk Shops provides that every purveyor of milk shall, on any outbreak of infectious disease within the building or upon the premises in which he keeps milk coming to his knowledge, remove all milk for sale from such building until it has been disinfected.

The respondent, a purveyor of milk, was tenant of a three-storied building, each floor of which was adapted for separate occupation, but with a central staircase common to each. He occupied the ground-floor for the purpose of his business, sub-let the first floor, and occupied the second floor as a residence for himself and his family. One of his children had scarlet fever in a room on the second floor:—

Held, that this was an outbreak of infectious disease within the building in which the respondent kept milk, and, therefore, that the non-removal from the ground-floor of milk for sale there was an infringement by him of the above regulation. LONDON COUNTY COUNCIL *v.* EDWARDS **Div. Ct. 75**

LORD OF MANOR—Compensation — Allotment for turbary—Legal estate in land **555**
See INCLOSURE.

MARINE INSURANCE - - **114, 187**
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—— Attachment of risk—Ships "sailing" on or after a specified date - - **398**
See INSURANCE, MARINE. 1.

—— Collision—Loss by detention during repairs —Damages—Remoteness - - **626**
See INSURANCE, MARINE. 2.

—— Reinsurance — "Open cover"—Validity—Stamp - - - - **351**
See INSURANCE, MARINE. 5.

MARRIED WOMAN—Loan by wife to husband for purposes unconnected with his business—Proof - - - - **330**
See BANKRUPTCY. 4.

—— Receiving order - - - **576**
See BANKRUPTCY. 3.

MASTER AND SERVANT—*Criminal Liability of Master for Act of Servant—Sale of Goods to which False Trade Description is applied—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

The provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a forged trade-mark or false trade description is applied, make a master criminally liable for acts done by his servants in contravention of the section when acting within the general scope of their employment, although contrary to their master's orders, unless the master can shew that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission of offences by his servants. COPPEN *v.* MOORE (No. 2) - - - - **Div. Ct. 306**

2. —— *Servant of one Person hired by another to Drive his Carriage—Liability of Hirer for Negligence of Driver.*

The defendant was the owner of a brougham, horses, and harness which he kept at a livery-stable. The keeper of the livery-stable was in the habit of supplying the defendant with one of his own servants to drive the brougham. One day, whilst the brougham was being driven with one of the defendant's horses, the driver, owing to his negligence, as the jury found, lost control of the horse, which dashed through the window of the plaintiff's shop and did damage. The man who was driving the brougham at the time of the accident had continuously driven the defendant for the preceding six weeks, and at the time of the accident was wearing a suit of livery which had been supplied to him by the defendant.

Held, that upon these facts there was evidence on which a jury might find that the driver at the time of the accident was acting as the servant of the defendant, so as to render the defendant responsible for the consequences of his negligence. JONES *v.* SCULLARD - - **Lord Russell of Killowen C.J. 565**

3. —— *"Workman"—Person employed in Coal Mine by Contractor—Liability of Mine-owner—Working "under a Contract with an Employer"—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 58)—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

By s. 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by s. 10 of the Act of 1875 a "workman" means "any person who, being a labourer, ... miner, or otherwise engaged in manual labour, ... has entered into or works under a contract with an employer," whether the contract be express or implied.

By the special rules of a colliery made under s. 51 of the Coal Mines Regulation Act, 1887, the manager of the mine was made responsible for the control, management, and direction of the mine, and was to appoint such competent persons as might be necessary for carrying out the provisions of the Act, and all persons employed in or about the mine were to obey his directions; and the chargeman in each shift was to have charge of the sinking operations.

E. entered into a contract with the owners of the colliery to sink a shaft in their coal mine.

MASTER AND SERVANT—*continued.*

By the contract E. (who was therein called the contractor) was to provide such sinkers, &c., as might be necessary for the execution of the work, and was to be paid a certain sum per fathom sunk. E. employed and paid the sinkers, he himself acting as "chargeman" in charge of the sinking operations. One of the sinkers, while engaged upon the work, was killed by a block of wood falling upon him, and his administratrix brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death:—

Held, that E. was an independent contractor; that the deceased was not a "workman" who had entered into or worked under a contract with the colliery owners as his employers within the meaning of s. 10 of the Employers and Workmen Act, 1875; and that therefore the Employers' Liability Act, 1880, did not apply:

Held, also, that the control given by the Coal Mines Regulation Act, 1887, and by the special rules of the mine, to the manager over all persons in the mine, did not make E. and the sinkers employed by him "workmen" in the employment of the colliery owners within the meaning of s. 10 of the Act of 1875. MARROW *v.* FLIMBY AND BROUGHTON MOOR COAL AND FIRE BRICK COMPANY C. A. 588

—— Neglect to fence machinery—Penalty—Common employment - - 402
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MERCANTILE LAW — Borrower and lender—Money charged upon land—Payment of interest by co-debtor - - 223
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MERCHANDISE MARKS—False trade description—Absence of intent to deceive—Liability - - - - 19
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—— False trade description—Verbal statement—Description in invoice written at purchaser's request - - 300
See TRADE-MARK. 1.

—— Sale of goods to which false trade description is applied—Criminal liability of master for act of servant - - 306
See MASTER AND SERVANT. 1.

MERGER—Estate duty—Life estate—Surrender to remainderman—"Interest ceasing on death of deceased" - - 147
See REVENUE. 2.

METROPOLIS - - - - - 1, 31, 75
See LONDON. 1—3.

MILK — Non-removal of — Nuisance—"Building"—Dairies, Cowsheds, and Milk Shops Order, 1885 - - - 75
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MINE—Employers' Liability Act—Liability of mine-owner—Working "under a contract with an employer" - - 588
See MASTER AND SERVANT. 3.

MISDEMEANOUR — Discharge of bankrupt—Refusal of - - - - 495
See BANKRUPTCY. 1.

MORTGAGE — Borrower and lender — Money charged upon land—Payment of interest by co-debtor - - - 223
See LIMITATIONS, STATUTE OF. 2.

MUSIC — By-law — Reasonableness — Playing music or singing after request to desist
See LOCAL GOVERNMENT. 3. 91

—— Stamp—Reconveyance to building society
See REVENUE. 7. 294

NEGLIGENCE—*Injury causing Death—Alien—Negligence of British Subject—Cause of Action outside Jurisdiction—Fatal Accidents Acts*, 1846 *and* 1864 (9 *&* 10 *Vict. c.* 93; 27 *&* 28 *Vict. c.* 95).

The provisions of the Fatal Accidents Acts, 1846 and 1864, by which damages can be recovered for death caused by negligence, do not apply for the benefit of aliens abroad, and therefore the representative of an alien whose death has been caused by the negligence of a British subject, outside the jurisdiction of the Court, cannot maintain an action to recover damages in respect of the death. ADAM *v.* BRITISH AND FOREIGN STEAMSHIP COMPANY - Darling J. 430

2. —— *Public Body — Contract to execute Works—Control over Contract—Negligence of Contractor—Liability of Public Body—Payment into Court by Contractor—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150.

A District Council, acting under the Public Health Act, 1875, s. 150, employed a contractor to make good a highway, which was used by the public, but had not become repairable by the inhabitants at large. The work was to be executed according to instructions to be furnished to the contractor by the District Council's surveyor. In carrying out the work the contractor negligently left on the road a heap of soil and grass, unlighted and unprotected. A person walking on the road after dark fell over the heap and was injured:—

Held, that the District Council, having the control of the works, were liable for the negligent acts which they had permitted.

In an action for damages by the person injured against the District Council and the contractor, the contractor paid into court a sum exceeding the damages found by the jury:—

Held, that the payment into court by the contractor afforded no defence to the District Council, and the plaintiff was entitled to judgment against them, but as the damages had been obtained from the contractor, the judgment should be confined to costs.

Per Bruce J.: When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor, and no sound distinction in this respect can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will

NEGLIGENCE—*continued.*
in fact be, used by persons lawfully entitled so to do.

Hardaker v. *Idle District Council*, [1896] 1 Q. B. 335, and *Pickard* v. *Smith*, (1861) 10 C. B. (N.S.) 470, followed. PENNY *v.* WIMBLEDON URBAN DISTRICT COUNCIL - - Bruce J. 212

—— Bill of lading—Negligence of master—Master also part owner - - 130
See SHIP.

—— Lease—Premises let in floors—Injury from overflowing cistern — Negligence of plumber - - - - 426
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—— Neglect to fence machinery — Penalty — Common employment - - 402
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—— Policy—Loss by negligence of master—Master also part owner - - 114
See INSURANCE, MARINE. 3.

—— Servant of one person hired by another to drive his carriage—Liability of hirer for negligence of driver - - 565
See MASTER AND SERVANT. 2.

NEGOTIABLE INSTRUMENT—*Debenture Payable to Bearer—Usage—Company.*

The plaintiffs, a limited company, were possessed of certain debentures, issued by an English company in England and payable to bearer, which by reason of the conditions indorsed thereon were not promissory notes. These debentures were kept in a safe, the key of which was entrusted to the plaintiffs' secretary. The secretary, in fraud of the plaintiffs, took the debentures from the safe and pledged them with the defendants for advances made to him by them. The defendants received the debentures in good faith. It was proved that the usage in the mercantile world and on the Stock Exchange for many years had been to treat such debentures as negotiable instruments transferable by mere delivery:—

Held, that although the plaintiffs were not estopped by their conduct from denying the defendants' title, yet the defendants were entitled to the debentures as against the plaintiffs on the ground that the debentures were negotiable instruments transferable by delivery.

Crouch v. *Crédit Foncier of England*, (1873) L. R. 8 Q. B. 374, has been in effect overruled by *Goodwin* v. *Robarts*, (1875) L. R. 10 Ex. 337; (1876) 1 App. Cas. 476. BECHUANALAND EXPLORATION COMPANY *v.* LONDON TRADING BANK Kennedy J. 658

NEW SOUTH WALES—Trust Property Act of 1862—Equity of redemption—Sale—Stamp 141
See REVENUE. 4.

NEWSPAPER—Practice — Pleading — Payment into court - - - - 56
See LIBEL.

NUISANCE—*Fence adjoining Highway—Defective Condition—Injury to Child using Highway—Proximate Cause of Injury—Liability of Owner of Fence.*

The defendant was the owner of a fence abutting on a highway. The plaintiff, a child of four years of age, attracted by some boys at play on

NUISANCE—*continued.*
the other side of the fence, put his foot on it, and it fell on and injured him. In an action for damages for the injuries so sustained, the jury found that the fence was very defective, but actually fell through the plaintiff standing wholly or partly on it, though not for the purpose of climbing over:—

Held, that the defective fence being a nuisance, and the cause of the injuries to the plaintiff, the defendant was liable. HARROLD *v.* WATNEY C. A. 320

—— Drainage of contiguous houses by combined operation — Subsequent unauthorized connection from—Drain from adjoining premises - - - - 1
See LONDON. 2.

—— Non-removal of milk—"Building"—Dairies, Cowsheds, and Milk Shops Order, 1885
See LONDON. 3. 75

OFFENCES — "Counselling" commission — Cruelty to animals—Information—Summary jurisdiction - - - 641
See JUSTICES.

PARLIAMENT—*Election — Return of Election Expenses — "Transmit" — Error in Return — Penalties—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 33, 34.

In sub-s. 1 of s. 33 of the Corrupt and Illegal Practices Prevention Act, 1883 (which provides that, within thirty-five days after the day on which the candidates returned at an election are declared elected, the election agent of every candidate at that election shall "transmit" to the returning officer a true return respecting his election expenses), the word "transmit" means "send," and therefore, if the return is posted to the returning officer within the thirty-five days, the sub-section is complied with, although the return does not reach him until after the expiration of that period.

The fact that the return of election expenses transmitted to the returning officer under s. 33 contains an error does not make it a nullity so as to render the candidate liable to the penalties imposed by sub-s. 5 of that section upon a candidate for sitting or voting before the return required by the Act has been transmitted. MACKINNON *v.* CLARK - - - C. A. 251

PAROL EVIDENCE—To renew bill of exchange —Inadmissibility of evidence - 487
See BILL OF EXCHANGE. 2.

PARTIES—Action by one of two joint promisees —Refusal of other to join as co-plaintiff —Power to add as co-defendant - 380
See PRACTICE. 8.

PAVING—Expenses of paving street—Summary recovery from owner—Claim by owner against tenant—Covenant - 315
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PAYMENT INTO COURT — Before defence—Order on plaintiff to pay defendant's costs—Jurisdiction - - - 326
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PAYMENT INTO COURT—*continued.*

—— By contractor—Negligence of contractor—Liability of public body - - 212
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—— Interpleader—Seizure of the goods by another execution creditor—Further payment into court - - - 164
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—— Practice—Libel—Newspaper—Pleading 56
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PENALTY—Neglect to fence machinery—Master and servant—Common employment 402
See FACTORY ACTS.

—— Return of election expenses—"Transmit"—Error in return - - - 251
See PARLIAMENT.

PLANS—London Building Act—Rebuilding on old site—Certified plans of old building
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POLICY—Attachment of risk—Ships "sailing" on or after a specified date - 398
See INSURANCE, MARINE. 1.

—— Collision—Loss by detention during repairs—Damages—Remoteness - - 626
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—— Marine insurance - - 114, 187
See INSURANCE, MARINE. 5, 6.

—— Reinsurance—"Open cover"—Contract for sea insurance—Validity—Stamp 351
See INSURANCE, MARINE. 5.

POOR-RATE—*Appeal—Procedure—Net Annual Value—Gross estimated Rental—Evidence—Admissibility—The Poor Rate Act*, 1801 (41 *Geo.* 3, *c.* 23), *s.* 1—*The Parochial Assessments Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

Where, on objection being made to a poor-rate, the rating authority has fixed the amount of the gross estimated rental of the premises rated appearing in the rate-book, and the ratepayer appeals to quarter sessions against the rate, the rating authority is bound by the amount of the gross estimated rental so fixed, and is not entitled to call evidence before the Court of Quarter Sessions to shew that the gross estimated rental has been fixed too low. HORTON & SON, LIMITED *v.* WALSALL ASSESSMENT COMMITTEE AND DARLASTON OVERSEERS - - Div. Ct. 237

2. —— *Assessment—Rateable Value—Licensed House—Competition of Brewers—"Tied" Houses—Parochial Assessment Act*, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In assessing a licensed public-house to the poor-rate, the fact that there is a great competition amongst brewers in the district to obtain the tenancy of such houses in order to sub-let them as "tied" houses ought not to be excluded from consideration so far as it shows the existence of such a demand as would necessarily increase the rent at which the premises might reasonably be expected to let, whether to brewers or others, on a tenancy from year to year; but the gross estimated rental ought not to be fixed at the special sum, in excess of the annual value obtainable in the market, which a brewer might be willing to give on the consideration, personal to himself, that he could make large profits by sub-letting the house as a "tied" house. BRADFORD-ON-AVON UNION ASSESSMENT COMMITTEE *v.* WHITE Div. Ct. 630

PRACTICE—*Costs—Appeal for Costs—Costs in Discretion of Judge—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 49—*Costs of Examination as to Debtor's Means and of Garnishee Proceedings—Rules of Supreme Court, Orders* XLII., *rr.* 32, 34; XLV., *r.* 9.

The plaintiff, having obtained judgment and being unable to obtain payment of his debt, obtained, under Order XLII., r. 32, an order to have the debtor examined as to his means. The debtor on his examination admitted having a retiring pension and a balance at his bankers. The plaintiff then obtained a garnishee order against the bankers, and by that means recovered part of his debt. He then applied for his costs of the examination proceedings and of the garnishee proceedings. The master refused to make any order, on the ground, as was stated by affidavit, that the practice in the Queen's Bench Division was to treat such proceedings as a luxury, the costs of which the plaintiff could not throw on the defendant. The plaintiff appealed; the judge in chambers dismissed the appeal, as was stated, on the same ground, and refused leave to appeal. The plaintiff applied to the Court of Appeal, who gave leave, and he then appealed against the order in chambers:—

Held, that as by the express terms of the Judicature Act, 1873, s. 49, no appeal will lie from any order as to costs which are left to the discretion of the Court except by leave of the judge making such order, and the costs in question were, by the terms of Order XLII., r. 34, and Order XLV., r. 9, in the discretion of the judge, the appeal must be dismissed, though the Court stated their inability to understand the practice alleged to exist in the Queen's Bench Division that examination of a debtor as to his means, and proceedings to attach debts due to him, were luxuries the costs of which the debtor ought not to be called on to pay. ADLINGTON *v.* CONYNGHAM - - - - - C. A. 492

2. —— *Costs — Payment into Court before Defence—Acceptance in Satisfaction — Order on Plaintiff to Pay Defendant's Costs—Jurisdiction—Rules of Supreme Court, Order* XXII., *r.* 7.

Where money has been paid into court before delivery of defence, and accepted by the plaintiff in satisfaction, within the time limited by Order XXII., r. 7, there is no jurisdiction to order the plaintiff to pay the costs of the defendant incurred between the dates of the payment into court and the acceptance in satisfaction. Order XXII., r. 7, is applicable to cases in which there are no pleadings. LOMER *v.* WATERS C. A. 326

3. —— *Costs—Taxation—Counter-claim.*

In an action where there is a claim and counter-claim, the party ordered to pay or receive the costs of the action pays or receives the whole of such costs as if there were no counter-claim.

The party ordered to pay or receive the costs of the counter-claim pays or receives the costs occasioned by the counter-claim, and in determining what they are, costs which have been

PRACTICE—*continued.*

saved by a counter-claim being brought instead of a cross-action are not to be taken into account.

Costs which have been incurred partly in support of or in opposition to a defence, and partly in support of or in opposition to a counter-claim, must be apportioned by the taxing master, but no costs incurred in the action which have not been increased by reason of the counter-claim are to be apportioned.

Saner v. *Bilton*, (1879) 11 Ch. D. 416, and *Shrapnel* v. *Laing*, (1888) 20 Q. B. D. 334, considered.

Decision of Channell J., affirming the decision of the taxing master, reversed. ATLAS METAL COMPANY *v.* MILLER - - **C. A. 500**

4. —— *Evidence — Commission — Subject-matter of Action—Sending out of Jurisdiction for Identification — Rules of Supreme Court, Order XXXVII., r. 5; Order L., r. 3.*

Where witnesses are to be examined on commission out of the jurisdiction of the Court, an order may be made that the subject-matter of the action shall be sent out of the jurisdiction for the purpose of identification by the witnesses. CHAPLIN *v.* PUTTICK - - - **C. A. 160**

5. —— *Interpleader—Seizure of Goods in Execution—Payment into Court by Claimant—Seizure of the Goods by another Execution Creditor—Goods claimed by Claimant—Further Payment into Court.*

Where goods seized in execution under a judgment have been claimed and the claimant has paid into court money to abide the event of an interpleader issue between himself and the execution creditor, and the goods are again seized in execution by another judgment creditor and again claimed by the claimant and an interpleader issue is ordered, to prevent the goods being sold the claimant must pay money into court as security to the second execution creditor, and to abide the event of the second interpleader. KOTCHIE *v.* GOLDEN SOVEREIGNS, LIMITED. BRIGHT, CLAIMANT - - - **C. A. 164**

6. —— *Joinder of Plaintiffs—Separate Causes of Action—Same Transaction—Rules of Supreme Court, Order XVI., r. 1.*

A plaintiff in his statement of claim on his own behalf claimed damages from the defendants, who were directors of a company, for inducing him by fraud to purchase shares in the company, and stated in his particulars of the alleged fraud (among other things) that the defendants had declared and paid a dividend on the shares of the company when there were no profits; and he claimed in the same action on behalf of himself and all other the shareholders of the company a declaration that the payment of the dividend as aforesaid was ultra vires and illegal, and judgment against the defendants for repayment of the amount of the dividend to the company:—

Held, that the plaintiff was not entitled under Order XVI., r. 1, to join both causes of action in one action, as the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions within the meaning of the rule above mentioned. STROUD *v.* LAWSON **C. A. 44**

PRACTICE—*continued.*

7. —— *Judgment obtained by Fraud—Fresh Action to set aside Judgment—Jurisdiction.*

Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside. COLE *v.* LANGFORD - **Div. Ct. 36**

8. —— *Parties—Pleading—Action by one of two joint Promisees—Refusal of Other to join as co-Plaintiff—Power to add as co-Defendant.*

One of two joint promisees can maintain an action on the contract, making the other joint promisee a co-defendant if, after tender of an indemnity against costs, he refuses to be joined as a co-plaintiff. CULLEN *v.* KNOWLES **Bigham J. 380**

—— Notice of statutory defence—Statute of Frauds—Sale of goods - - - **219**
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—— Payment into court—Libel—Newspaper—Pleading - - - - **56**
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PRIVATE STREET WORKS—Proposed works—Objections—"Insufficient or unreasonable" - - - - **274**
See LOCAL GOVERNMENT. 5.

PROOF—"Cover"—"Money deposited to abide the event"—Bankruptcy - - **383**
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—— Loan by wife to husband for purposes unconnected with his business - **330**
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—— Onus of—Rates for merchandise—Rebate—Siding not belonging to railway company—Station accommodation - **435**
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PUBLIC BODY—Liability of—Contract to execute works—Control over contract—Negligence of contractor - - **212**
See NEGLIGENCE. 2.

PUBLIC HEALTH—Public body—Liability of—Negligence of contractor - - **212**
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—— Street—Expenses of paving—Summary recovery from owner—Claim by owner against tenant—Covenant - **315**
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—— Water rates—Liability of contributory place for expense of water supply to part of such place - - - **358**
See LOCAL GOVERNMENT. 7.

PUBLIC-HOUSE—Licence.
See Cases under LICENSING ACTS.

—— Loss of property—Innkeeper—Liability—"Guest" - - - - **284**
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—— Poor-rate—Assessment—Competition of brewers—"Tied" houses - - **630**
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QUARTER SESSIONS—Bridges—Liability to contribute to cost of - - **246**
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—— Separate court of—Liability for costs of—Salaries - - - - **468**
See LOCAL GOVERNMENT. 2.

RAILWAY—*Charge for Use of Sidings—Right of Action—Arbitration—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25)—*Provisional Order.*

By a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, and confirmed by statute, a railway company were empowered to charge, in addition to the tonnage rate, a reasonable sum for the service, if rendered to a trader at his request or for his convenience, of allowing him "the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof, and services rendered in connection with such use and occupation," and "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

The company gave notice to the defendant, a trader, that they would allow him four days, free of charge, within which to unload goods consigned to him arriving at their station, and that after the expiration of the four days they would charge him 6*d.* per day siding rent for each wagon allowed to remain unloaded. In an action by the company to recover from the defendant siding rent at the rate of 6*d.* per day in respect of wagons which, after receiving that notice, he had allowed to remain unloaded after the four days, the defendant disputed his liability to pay the amount charged:—

Held, that the jurisdiction of the Court was ousted, because under s. 5 of the statute an arbitrator appointed by the Board of Trade is the only tribunal for the settlement of any differences arising under that section.

Judgment of the Divisional Court, [1898] 1 Q. B. 748, reversed. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* DONELLAN. LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* BILLINGTON, LIMITED - - C. A. 7

2. —— *Regulation—Rates for Merchandise—Siding not belonging to Railway Company—Station Accommodation and Terminal Services—Allowance or Rebate in respect thereof—Evidence—Onus of Proof—Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 4.

By s. 4 of the Railway and Canal Traffic Act, 1894, whenever merchandise is received or delivered by a railway company at a siding not belonging to the company, and a dispute arises as to any allowance or rebate to be made from the rates charged in respect that the railway company does not provide station accommodation or perform terminal services, the Railway Commissioners shall have jurisdiction to hear and determine such dispute, and to determine what, if any, is a reasonable and just allowance or rebate.

At the hearing of an application for an allowance or rebate under this section on the ground that the rates charged by the railway company, in respect of goods sent from the applicants' siding, included a charge for station accommodation at the siding:—

Held, by A. L. Smith and Rigby L.JJ., Vaughan Williams L.J. not assenting, that the applicants, by merely proving that they were charged the rates, and that the siding did not belong to the railway company, had not made out a primâ facie case that the rates included a charge for station accommodation at the siding so as to throw upon the railway company the onus of proving that the rates did not include a charge for station accommodation. SALT UNION, LIMITED *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY - - - - C. A. 435

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RATE—Appeal - - - - 237
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—— Exemption — Liability to repair ratione tenuræ—Res judicata—Decision quashing previous rate - - - 66
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—— Poor rate—Assessment—Licensed house—Competition of brewers — "Tied" houses - - - - 630
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—— Siding not belonging to railway company—Station accommodation — Rebate in respect thereof - - - 435
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RATEABLE VALUE—Poor-rate—Assessment—Licensed house—Competition of brewers —"Tied" houses - - 630
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REAL PROPERTY LIMITATION — Money charged upon land — Payment of interest by co-debtor - - 223
See LIMITATIONS, STATUTE OF. 2.

REBUILDING—On old site—Certified plans of old building—London Building Act
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RECONVEYANCE—To building society—Stamp—Mortgage - - - 294
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RECORDER — Salary of — Liability — Separate court of quarter sessions - - 468
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REDEMPTION—Purchase in England of equity of—Property situate out of the United Kingdom—Agreement for sale—Stamp
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RE-ENTRY — Proviso for — Lease — Company—Liquidation for purposes of reconstruction - - - - 259
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RE-INSURANCE—Discovery of ship's papers—Practice — Action by underwriters against re-insurer - - - 187
See INSURANCE, MARINE. 4.

—— "Open cover"—Contract for sea insurance—Validity—Stamp - - 351
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REMITTED ACTION—Costs—Judgment in High Court for part of claim—Scale applicable in county court - - 270
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REMOTENESS — Damages—Policy—Collision—Loss by detention during repairs 626
See INSURANCE, MARINE. 2.

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REPAIRS—Artificial watercourse—Sluice-gate—Obligation of owner to repair—Easement - - - - - 608
See WATER.

—— Footpath — Evidence of liability to repair ratione tenuræ—Remedy against a person so liable to repair - - 83
See HIGHWAY. 1.

RES JUDICATA—Rate—Exemption — Liability to repair ratione tenuræ — Decision quashing previous rate - - 66
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REVENUE—*Estate Duty—Exemption—Property Settled by Husband or Wife—Postponement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-s.* 5.

Property belonging to a wife was settled upon trust to pay the income to the husband for life, and after his death to the wife for life, and after the decease of the survivor of them upon the following trusts: if the wife should survive the husband, then after his decease upon trust for her absolutely; but if she should die in his lifetime, then after his decease upon such trusts as the wife should by will appoint, and in default of appointment for her statutory next of kin. The husband died after the Finance Act, 1894, came into operation, leaving his wife surviving:—

Held (reversing the decision of Vaughan Williams and Kennedy JJ.), that s. 21, sub-s. 5, of the Act did not apply to a case where the survivor of the husband and wife became on the death of the other entitled, not to the income only, but to the corpus of the property settled, and that upon the death of the husband estate duty became payable by the wife upon the principal value of the property settled. ATTORNEY-GENERAL *v.* STRANGE - - - C. A. 39

2. —— *Estate Duty—Life Estate—Surrender to Remainderman—Merger—"Interest ceasing on Death of Deceased"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*).

By s. 1 of the Finance Act, 1894, estate duty is made payable on the principal value of all property, real or personal, settled or not settled, which passes on the death of any person dying after the commencement of that part of the Act. By s. 2, sub-s. 1 (*b*), property passing on the death of the deceased includes "property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

The tenant for life of certain property comprised in a marriage settlement, with a power of appointment, appointed the property to her son subject to her own life interest; by a subsequent deed she surrendered her life interest in the settled property to the trustees of the settlement "to the end and intent that such life interest may merge in the interest in remainder of" her son:—

Held that, upon the death of the tenant for life, estate duty did not become payable in respect of the property surrendered to the son, as property passing on her death within the meaning of the Finance Act, 1894.

Judgment of the Divisional Court, [1897] 2 Q. B. 535, reversed. ATTORNEY-GENERAL *v.* BEECH - - - - - C. A. 147

3. —— *Estate Duty—Settlement—Reservation of Interest to Settlor—Extent of Liability to Duty on Death of Settlor—Conditional Power of Revocation of Settlement—Exclusion of Benefit to Donor—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*), (*c*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*).

By a deed, made in 1885, the owner of certain estates gave them to the defendant in fee, subject to the reservation of an annual rent-charge payable to the donor and expressed to be issuing out of the estates so given. The donor also assigned (with certain exceptions) his personal estate to the defendant, subject to certain trusts and provisions, and subject as to part thereof to a beneficial interest in the donor for his life. The defendant covenanted to pay the debts of the donor, and the deed contained a conditional power of revocation.

After the commencement of Part I. of the Finance Act, 1894, and before the happening of any of the events upon which the power of revocation was exercisable, the donor died:—

Held, affirming the judgment of a Divisional Court, [1898] 1 Q. B. 318, that all the property existing at the death of the donor was liable to estate duty.

By A. L. Smith and Rigby L.JJ., on the ground that it was property which must be deemed to have passed on the death of the donor within s. 38, sub-s. 2, of the Customs and Inland Revenue Act, 1881, as amended by s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889, and s. 2, sub-s. 1 (*c*), of the Finance Act, 1894.

By Vaughan Williams L.J.: That it was property of which the donee did not assume possession and enjoyment to the entire exclusion of any benefit to the donor within the meaning of s. 11, sub-s. 1, of the Customs and Inland Revenue Act, 1889. ATTORNEY-GENERAL *v.* EARL GREY C. A. 534

4. —— *Stamp—Agreement for Sale—Equitable Estate—Property locally situate out of the United Kingdom—Purchase in England of Equity of Redemption—Ad Valorem Duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1—*Trust Property Act of* 1862, *New South Wales* (26 *Vict. No.* 12), *s.* 25.

By the Stamp Act, 1891, s. 59, sub-s. 1, "Any contract or agreement made in England under seal, or under hand only, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except property locally situate out of the United Kingdom," is charged with ad valorem duty.

By the New South Wales Trust Property Act of 1862, s. 25, "All mortgages of real or personal estate shall hereafter be deemed at law, as now

REVENUE—*continued.*

in equity, pledges only of the property thereby mortgaged; and nothing in any such mortgage shall prevent the title of any mortgagor, or person claiming and being in possession, from being deemed a good title at law, subject to such pledge, as against all persons other than the mortgagee and those claiming under him."

The appellants entered into a written agreement in England to purchase property in New South Wales, subject to a mortgage.

On a case stated by the Commissioners of Inland Revenue, pursuant to s. 13 of the Stamp Act, 1891:—

Held, that the words of exception in the Stamp Act, 1891, s. 59, sub-s. 1, do not apply to an equitable estate or interest in property locally situate out of the United Kingdom, and therefore the general words, "any equitable estate or interest in any property whatsoever," apply, and ad valorem duty is payable on an agreement made in England for the purchase of such an estate:

Held, also, that the New South Wales Trust Property Act does not confer the legal estate in mortgaged property on the mortgagor:

Held, therefore, that ad valorem duty was payable on the purchase by the appellants of the equity of redemption. FARMER & Co., LIMITED *v.* INLAND REVENUE COMMISSIONERS - Div. Ct. 141

5. —— *Stamp—Agreement in Consideration of Fixed Quarterly Payments—"Bond, Covenant, or Instrument"—Stamp Act*, 1891 (54 & 55 *Vict.* c. 39), *Sched.*

By the first schedule to the Stamp Act, 1891, a bond, covenant, or instrument of any kind whatsoever, being the only, or principal, or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, is chargeable, if for a definite and certain period, so that the total amount to be ultimately payable can be ascertained, with the same ad valorem duty as a bond or covenant for such total amount; if for the term of life or any other indefinite period with a duty of 2*s.* 6*d.* for every 5*l.*, and also for any fractional part of 5*l.* of the annuity or sum periodically payable.

By a separation deed between a husband and wife the husband covenanted to pay the wife for her separate use without power of anticipation "the sum of 625*l.* every three months by quarterly payments on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year":—

Held, that the deed was a security for an annuity or yearly sum payable by quarterly instalments, and not for a sum of money payable at quarterly periods, and that it was therefore liable to ad valorem duty upon the amount of the annuity and not upon the sum payable quarterly.

Clifford v. *Inland Revenue Commissioners*, [1896] 2 Q. B. 187, distinguished. LEWIS AND LEWIS *v.* INLAND REVENUE COMMISSIONERS Div. Ct. 290

6. —— *Stamp—Conveyance on Sale—Agreement for Sale—Ad valorem Duty—Leasehold Interest in Licensed House—Goodwill—Stamp Act*, 1891 (54 & 55 *Vict.* c. 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "any contract or agreement made in England or Ireland under seal, or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages . . . . or goods wares or merchandise . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash, and book debts; of the total consideration 4085*l.* was apportioned to "lease and goodwill," 1462*l.* to furniture, stock-in-trade, and 37*l.* to book debts. The vendor was to shew a good title to the lease and to assign the lease and goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10*s.*:—

Held, (1.) by A. L. Smith and Vaughan Williams L.JJ., affirming the judgment of the Divisional Court, [1898] 1 Q. B. 226, that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891; by Rigby L.J., that though the agreement was not on the face of it an agreement for the sale of an equitable interest, the proper inference to be drawn from the facts was that the bargain was for the sale of an equitable interest only; (2.) by A. L. Smith and Rigby L.JJ., reversing the decision of the Divisional Court, that the goodwill was not merely an enhancement of the value of the leasehold premises, but was capable of being sold independently thereof, and, as it was property other than lands, the agreement was liable to ad valorem duty in respect of the value of the goodwill; by Vaughan Williams L.J., that the goodwill was inseparable from the leasehold premises which were the subject of the sale, and that the instrument was not liable to ad valorem duty upon that portion of the consideration attributed to "lease and goodwill." WEST LONDON SYNDICATE, LIMITED *v.* INLAND REVENUE COMMISSIONERS - - - - C. A. 507

7. —— *Stamp—Mortgage—Reconveyance to Building Society—Building Societies Act*, 1874 (37 & 38 *Vict.* c. 42), *ss.* 41, 42—*Stamp Act*, 1891 (54 & 55 *Vict.* c. 39), *Sched. I.*

A reconveyance by a building society incorporated under the Building Societies Act, 1874, to the mortgagor is exempt from stamp duty by

REVENUE—*continued.*
virtue of s. 41 of that Act; nor is the right to exemption lost by reason of the trustees for the purpose of the dissolution of the society being joined as parties to the conveyance. OLD BATTERSEA AND DISTRICT BUILDING SOCIETY *v.* INLAND REVENUE COMMISSIONERS - **Div. Ct. 294**

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SALE OF GOODS—*Contract—Passing of Property—Bill of Exchange—Dishonour by Buyer—Bill of Lading—Indorsement by Buyer—Possession of Goods—Consent of Seller—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 19, *sub-s.* 3; *s.* 25, *sub-s.* 2 —*Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 2.

Goods were sold, and shipped to the buyer, to whom the seller forwarded the bill of lading, together with a bill of exchange for acceptance. The buyer did not accept the bill of exchange, but sold the goods, and indorsed the bill of lading, to the plaintiff. The seller stopped the goods, and indemnified the shipowner.

In an action against the shipowner for non-delivery of the goods:—

Held, that, as by the Sale of Goods Act, 1893, s. 19, sub-s. 3, the buyer, not having accepted the bill of exchange, was bound to return the bill of lading, the property in the goods did not pass to him, and he could transfer no title to the plaintiff:

Held, also, that, as the consent of the seller

SALE OF GOODS—*continued.*
to the possession of the goods by the buyer was conditional on the buyer's acceptance of the bill of exchange, the buyer had not obtained possession of the goods with the consent of the seller, within the meaning of the Sale of Goods Act, 1893, s. 25, sub-s. 2, and could not transfer title, under that clause, and the Factors Act, 1889, s. 2, sub-s. 2:

Held, therefore, that the plaintiff was not entitled to recover as indorsee of the bill of lading. CAHN AND MAYER *v.* POCKETT'S BRISTOL CHANNEL STEAM PACKET COMPANY, LIMITED **Mathew J. 61**

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SHERIFF—*Execution—Seizure of Goods—Going out of Possession—Abandonment.*

Where a sheriff, who has seized goods under a writ of execution, goes out of possession, the question whether he has abandoned possession is a question of fact. BAGSHAWES, LIMITED *v.* DEACON - - - - - **C. A. 173**

SHIP—*Bill of Lading—Exception—Negligence of Master — Master also Part Owner—Applicability of Exception.*

A bill of lading was signed by the defendant, who was master and part owner of the ship, on behalf of himself and his co-owners. It contained an exception in respect of "the neglect and default of master in navigating the ship." The cargo was lost by the stranding of the ship through the negligence, but not the wilful negligence, of the defendant. In an action by the owners and shippers of the cargo:—

Held, that the negligence which caused the loss was that of the defendant exclusively as master and not as part owner, and was within

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the exception. WESTPORT COAL COMPANY *v.* McPHAIL - - - - C. A. 130
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THAMES—*By-law of Watermen's Company—Thames Navigation—Tug towing barges—Water-*

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man on Tug to assist in Management and Navigation—Ultra Vires—Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 *Vict. c. cxxxiii.*), *ss.* 66, 80.

By s. 80 of the Watermen's and Lightermen's Amendment Act, 1859, power is given to the Court of the Watermen's Company to make by-laws for the government of the company, for the government and regulation of lightermen and watermen, and for carrying into effect the purposes of the Act and the several powers and authorities thereby vested in the company.

By s. 66 of the Act, no barge, lighter, boat, or other like craft for the carrying of goods, wares, or merchandise is to be worked or navigated within the limits of the Act, unless there be in charge of such craft a licensed lighterman or qualified apprentice, under a penalty not exceeding 5*l.*

By by-law 60 of the Watermen's Company, made under the above Act, "Every steamboat navigated on the river within the limits of this Act in the towing of barges, lighters, vessels, or craft shall have one licensed waterman on board such steamboat for the purpose of assisting in the management and navigation thereof, and if any such steamboat shall be navigated in contravention of this section (*sic*) the owner thereof, or the master in charge of the same, shall incur a penalty not exceeding 40*s.*":—

Held, that the by-law was not a by-law made for carrying into effect the purposes of the Act, and was not authorized by the provisions of s. 66 of the Act, and that it was therefore ultra vires and bad. KENNAIRD *v.* CORY & SON **Div. Ct. 578**

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TRADE-MARK—*False Trade Description, Application of—Oral Statement—Description in Invoice written at Purchaser's Request — Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-s.* 2.

The provisions of s. 2, sub-s. 2, of the Merchandise Marks Act, 1887, which make it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely oral.

The respondent asked a salesman in the appellant's shop for a small English ham; the salesman pointed to some American hams on a shelf, and said, "These are Scotch hams"; the respondent chose one, which was weighed, and an invoice which did not contain the word "Scotch" was handed to the respondent by another assistant. The respondent told the assistant to put the word "Scotch" on the invoice, as he had bought the ham as such; the assistant did so, and handed the invoice to the respondent, who then paid the amount:—

Held, that the description in the invoice was a false trade description sufficient to satisfy the statute. COPPEN *v.* MOORE (No. 1) **Div. Ct. 300**

2. —— *Merchandise Marks — False Trade Description—Application to Goods—Absence of Intent to Deceive—Liability—Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, 3.

By the Merchandise Marks Act, 1887, s. 2, sub-s. 2, a person who sells goods, to which a false trade description is applied, is guilty of an offence, unless he proves certain facts, "or that otherwise he acted innocently."

By s. 3, sub-s. 1, "'False trade description' means a trade description which is false in a material respect as regards the goods to which it is applied."

The respondents were charged with selling cigarettes, to which a false trade description, namely, "guaranteed hand-made," was applied. The cigarettes were in fact machine-made, but were of equally good quality with hand-made cigarettes.

The magistrate held that there was no intention to deceive the buyer, but only to save expense by using up a stock of old labels, and that the description, though untrue in fact, was not a false trade description in any material respect, as regarded the cigarettes sold, within the meaning of s. 3, and dismissed the information.

On a case stated:—

Held, that the fact that the cigarettes sold as hand-made were of as good quality as hand-made cigarettes afforded no defence; that the description was false in a material respect, and that the respondents, having knowingly applied the false description, had not acted innocently, and were guilty of an offence against the Act. KIRSHENBOIM *v.* SALMON AND GLUCKSTEIN, LIMITED **Div. Ct. 19**

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WATER — *Artificial Watercourse — Alteration of Natural State of Things—Sluice-gate—Obligation of Owner to Repair—Easement—Right to take Water granted to Owner of adjoining Land—Damage by Flood.*

Where the owner of land on the bank of a river, for the purpose of bringing water from the river to a mill which he erected, made a watercourse with a shuttle at the head of it to control the flow of the water from the river into the

WATER—*continued.*
watercourse, and afterwards conveyed away a portion of his land adjoining, and his successor in title subsequently granted to the owner of the adjoining land so conveyed a right to use the water for the purposes of a mill belonging to him:—
Held, that the existence of that right did not affect the obligation of the owner of the watercourse towards the owner of the adjoining land to keep the shuttle in repair so as to prevent flood water from the river getting into the watercourse and overflowing on to his land.
Pomfret v. *Ricroft* (1669) 1 Wms. Saund. 321, discussed. R. H. Buckley & Sons, Limited *v.* N. Buckley & Sons - - - C. A. 608
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